CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 51

FERDINAND FISWICK, JACOB F. MAYER AND FRITZ GUSTAV RUDOLPH, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 4, 1946.

CERTIORARI GRANTED APRIL 22, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 51

FERDINAND FISWICK, JACOB F. MAYER AND FRITZ GUSTAV RUDOLPH, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Third Circuit	a	1
Appendix to Appellant's Brief	a	1
Docket entries	1	1
Indictment	10	7
Testimony	22	16
Motion to strike testimony	176	143
Offer of Exhibits	182	148
Motion to dismiss the indictment	204, 271	165, 225
Charge of the Court	285	235
Exceptions to charge	302	249
Further instructions to jury	306	252
Requests to charge, submitted on behalf of the defendants, Ferdinand Fiswick, Wilhelm Christian Poehlman and Walter Asmus Hansen	310	255
Requests to charge, submitted on behalf of the defendant, Fritz Gustav Rudolph	318	261
Requests to charge, submitted on behalf of the Defendant, Jacob Friedrich Mayer	320	262
Notice and grounds of appeal	242	282
Assignment of errors	345	284

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 12, 1946.

—5622

Appendix to Appellant's Brief—Continued

	Original	Print
Witnesses for the Government		
Lilly Illian:		
Direct	22	16
Cross	73	58
Redirect	100	83
Gustave Gauerke:		
Direct	101	83
Emil Wilhelm Borchers:		
Direct	105	87
Albert J. Komecki:		
Direct	125	102
Cross	128	104
Robert L. Bell:		
Direct	128	105
Cross	148, 175	120, 143
Redirect	173	141
Recross	174	142
George F. Dinneen:		
Direct	192	155
Cross	194	156
Donald A. Rosen:		
Direct	197	159
Cross	199	161
Witnesses for Defendants		
Jacob Friedrich Mayer:		
Direct	206	166
Cross	224	183
Redirect	232	190
Maria Mayer:		
Direct	235	192
Gloria Mayer:		
Direct	239	195
Cross	240	197
Redirect	241	197
Recross	241	197
Fritz Gustav Rudolph:		
Direct	242	198
Cross	248	204
Ferdinand Fiswick:		
Direct	259	214
Cross	265	220

Appendix to Appellant's Brief—Continued

Exhibits	Original	Print
G-1-F—Registration statement of Ferdinand Fiswick without pencil legends under column marked "Office Use"	321	265
G-1-G—Registration statement of Jacob F. Mayer without pencil legends under column marked "Office Use"	323	267
G-1-H—Registration statement of Fritz G. Rudolph without pencil legends under column marked "Office Use"	325	269
G-2—Application for admittance into National Socialist German Workers Party (translation)	326	271
G-56—Statement of Jacob F. Mayer	327	272
G-65—Statement of Ferdinand Fiswick	329	273
G-67—Statement of Fritz Gustav Rudolph	337	279

Order assigning judge	352	289
Minute entry of argument and submission	352	289
Opinion, McLaughlin, J.	353	290
Dissenting opinion, Waller, J.	364	301
Judgment	373	310
Petition for rehearing	374	311
Order denying petition for rehearing	387	318
Clerk's certificate	387	318
Order allowing certiorari	388	319
Stipulation as to printed record	389	319

[fol. a]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

vs.

FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH, Defendants-Appellants

On Appeal from Judgments of the District Court of the United States for the District of New Jersey

Appendix to Appellants' Brief—Filed July 11, 1945

[fol. 1] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

DOCKET ENTRIES

1944

Sept. 13. Indictment for conspiracy to violate Alien Registration Act of 1940, filed.

Sept. 13. Ordered indictment impounded. (M)

Sept. 13. Ordered bench warrants to be issued as to all defendants. (M)

Sept. 14. Notice of Allocation filed. (Newark)

Sept. 14. Ordered indictment released. (M)

Sept. 14. Bench warrants issued as to all defendants.

Sept. 19. Bench warrants returned, *non est inventus* as to the following: Albert Franz Schreiner, Hans Wilhelm Schnoor, Else Erna Marie Schreiner, Wilhelm Johannes Witt, Luise Otten, Hans Guenther Bauer, Hans Herman Kiefer, Karl Gerlach, Gerhard Ewald Sprenger, Heinrich Dittmann, Carl Jaeger, George Reimschneider, Hedwig Dorothea Jaeger, Emil Wilhelm Borchers, Joseph Anton Berberich, Herman Claus Koch, Bernhard Wilhelm Mueller and Erich Hellman, filed.

Sept. 25. Plea—Not guilty as to defendants Walter Fritz Wilhelm Burchardt, Ludwig Koenig, Heinrich Carl Walter Taeubner. (FK)

Sept. 25. Jacob Freidrich Meyer—Plea—Not Guilty. (FK) Ordered Frank W. Jackson admitted *pro hac vice*. (FK)

1944

Sept. 25. Ordered bench warrants issued as to defendants Karl Johann Boehm, and Ferdinand Fiswick. (FK) Bench warrants issued.

[fol. 2] Sept. 25. Edgar M. Ulrich—Ordered William V. Azzoli appointed attorney. (FK)

Sept. 27. Jacob Friedrich Mayer, Edgar M. Ulrich, Ludwig Koenig, Walter Fritz, Wilhelm Burchardt bench warrants returned executed, filed.

Sept. 28. Ernst Henry Nauert, Fritz Gustav Rudolph, Heinrich Carl Walter Taeubner, Willy Max Zimmer bench warrants returned, executed, filed.

Sept. 28. Ferdinand Fiswick, Wilhelm Christian Poehlmann, bench warrants returned *non est inventus,* filed.

Sept. 29. Walter Asmus Hansen—Bench warrant returned, executed, filed.

Sept. 29. Arthur Curtis Langenberg—Bench warrant returned executed, filed.

Sept. 29. Karl Johann Boehm—Bench warrant returned *non est inventus,* filed.

Sept. 29. Karl Johann Boehm—Duplicate bench warrant returned *non est inventus,* filed.

Oct. 2. Edgar M. Ulrich—Plea—Not Guilty. Ordered bail continued. (FK)

Oct. 2. Ernest Henry Nauert—Plea—Not Guilty. Ordered paroled in custody of counsel. (FK)

Oct. 2. Fritz Gustav Rudolph—Plea—Not Guilty. Ordered paroled on own recognizance. (FK)

Oct. 2. Willy Max Zimmer—Plea—Not Guilty. Bail of $500 to be posted in two days before Commissioner. (FK)

Oct. 2. Walter Asmus Hansen—Plea—Not Guilty. Ordered paroled in custody of counsel. (FK)

Oct. 2. Arthur Curtis Langenberg—Plea—Not Guilty. Bail of $500 to be posted in 2 days before U. S. Commissioner. (FK)

[fol. 3] Oct. 16. Joseph Anton Berberick—Plea—Not Guilty. Ordered remanded to Ellis Island, N. Y. in the event of being released from Ellis Island, bail is fixed at $3000.00. (M)

Oct. 16. Emil Wilhelm Borchers—Plea—Not Guilty. Ordered parole continued. (M)

Oct. 16. Herman Claus Koch—Plea—Not Guilty. Ordered remanded to Ellis Island, N. Y. in the event of being released from Ellis Island, bail is fixed at $3000.00. (M)

1944

Oct. 16. George Reimschneider—Plea—Not Guilty. Ordered remanded to Ellis Island, N. Y. in the event of being released from Ellis Island, bail is fixed at $3000.00. (M)

Oct. 16. Hans Wilhelm Schnoor—Plea—Not Guilty. Ordered remanded to Ellis Island, N. Y. in the event of being released from Ellis Island, bail is fixed at $3000.00. (M)

Oct. 16. Ferdinand Fiswick—Plea—Not Guilty. Ordered remanded to Ellis Island, N. Y. in the event of being released from Ellis Island, bail is fixed at $3000.00. (M)

Oct. 16. Karl Boehm—Plea—Not Guilty. Ordered remanded to Ellis Island, N. Y. in the event of being released from Ellis Island, bail is fixed at $3000.00. (M)

Nov. 15. Wilhelm Poehlmann—Plea—Not Guilty. (M)

Nov. 24. Motion to quash and to strike indictment and acknowledgment of service, filed.

Nov. 27. Trial moved before Hon. Thomas F. Meaney, Judge and Jury.

[fol. 4] Nov. 27. Ordered the motion of U. S. Attorney Stanziale for a severance to the following defendants, granted. (M) Gerhard Ewald Sprenger, Heinrich Dittmann, Carl Jaeger, Hedwig Dorothea Jaeger, Emil Wilhelm Borchers, Erich Hellman, Bernhard Wilhelm Mueller, Albert Franz Schreiner, Else Erna Marie Schreiner, Wilhelm Johannes Witt, Hans Guenther, Bauer, Luise Otten, Karl Gerlach, and Hans Herman Kiefer.

Nov. 27. Ordered the motions to withdraw pleas of not guilty as to all defendants, granted. (M)

Nov. 27. Ordered motions to quash indictment, denied. (M)

Nov. 27. All pleas of not guilty restored. (M)

Nov. 27. Hans W. Schnoor—Retracted plea of not guilty and pleaded guilty. Ordered remanded to Ellis Island, N. Y. (M)

Nov. 27. Heinrich Carl Walter Tauber—Retracted plea of not guilty and pleaded guilty. Ordered paroled in custody. (M)

Nov. 27. Herman Claus Koch—Retracted plea of not guilty and pleaded guilty. Ordered remanded to Ellis Island, N. Y. (M)

Nov. 27. Joseph Anton Berberich—Retracted plea of

1944

not guilty and pleaded guilty. Ordered remanded to Ellis Island, N. Y. (M)

Nov. 27. George Riemschneider—Retracted plea of not guilty and pleaded guilty. Ordered remanded to Ellis Island, N. Y. (M)

Nov. 27. Trial moved as to the following defendants: Karl Johann Boehm, Walter Fritz Wilhelm Burchardt, Ludwig Koenig, Edgar M. Ulrich, Ernst Henry Nauert, [fol. 5] Ferdinand Fiswick, Jacob Friedrich Mayer, Fritz Gustav Rudolph, Willy Max Zimmer, Wilhelm Christian Poehlmann, Arthur Curtis Langenberg and Walter Amus Hansen.

Nov. 27. Ordered adjourned to Nov. 28, 1944 at 10:00 A. M. (M)

Nov. 28. Trial continued.

Nov. 28. Karl Johann Boehm—Retracted plea of not guilty and pleaded guilty. Order remanded to Ellis Island, N. Y. (M)

Nov. 28. Ordered adjourned to Nov. 29, 1944 at 10:00 A. M. (M)

Nov. 28. Order authorizing Marshal to meet guards at Ellis Island for the purpose of obtaining defendant Ferdinand Fiswick and bringing him to the Post Office, Newark for trial, filed. (M)

Nov. 29. Trial continued.

Nov. 29. Ordered adjourned to Nov. 30, 1944 at 10:00 A. M. (M)

Nov. 29. Ferdinand Fiswick—Ordered the motion of U. S. Atty, to vacate order of 11-28-44 re Marshal bringing deft. from Ellis Island, granted. (M)

Nov. 30. Trial continued.

Nov. 30. Ordered trial adjourned to Dec. 1, 1944 at 12:00 M. (M)

Dec. 1. Trial continued.

Dec. 1. Ordered motion for a dismissal of the indictment or for a direction of verdict of not guilty, denied as to all defendants. (M)

Dec. 1. Ordered adjourned to Dec. 4, 1944 at 11:00 A. M. (M)

[fol. 6] Dec. 4. Trial continued.

Dec. 4. Motion to quash indictment as to Ludwig Koenig. Decision reserved. (M)

1944

Dec. 4. Ordered adjourned to Dec. 5, 1944 at 10:00 A. M.

Dec. 5. Trial continued.

Dec. 5. Ordered trial adjourned to Dec. 6, 1944 at 9:30 A. M.

Dec. 6. Trial continued.

Dec. 6. Ordered indictment dismissed as to Ludwig Koenig. (M)

Dec. 6. Ordered motion for a dismissal of the indictment and for the direction of a verdict of not guilty as to all defendants, denied. (M)

Dec. 6. Ordered motion to strike the statement of Ludwig Koenig and his alien registration form from the exhibits in evidence, granted. (M)

Dec. 6. Ordered trial adjourned to Dec. 7, 1944 at 9:30 A. M.

Dec. 7. Trial continued.

Dec. 7. Ordered luncheon be provided for jurors. (M)

Dec. 7. Ordered supper be provided for jurors. (M)

Dec. 7. Verdict: Walter Fritz Wilhelm Burchardt—Not Guilty; Ernst Henry Nauert—Not Guilty; Walter Asmus Hansen—Not Guilty; Ferdinand Fiswick—Guilty; Jacob Friedrich Mayer—Guilty; Fritz Gustav Rudolph—Guilty.

Dec. 7. Jury disagreed as to the following defendants: Edgar Ulrich, Willy Max Zimmer, Wilhelm Christian Poehlman and Arthur Curtis Langenberg.

[fol. 7] Dec. 7. Ordered defendants, Ulrich, Zimmer, Poehlman and Langenberg be released on original bond. (M)

Dec. 7. Ordered motions to set aside verdict as to defendants Fiswick, Mayer and Rudolph, fixed for hearing on Dec. 20, 1944. (M)

Dec. 7. Ordered adjourned to Dec. 8, 1944. (M)

Dec. 14. Petition for pay of bailiffs under Section 829, filed and Order for pay of bailiffs under Section 829, filed. (See 2676c)

Dec. 20. George Riemschneider—Ordered motion for cancellation of bail, granted. (M)

Dec. 20. Fritz G. Rudolph—Ordered motion for cancellation of bail, granted. (M)

Dec. 20. Hans Wilhelm Schnoor—Ordered motion for cancellation of bail, granted. (M)

Dec. 20. Heinrich C. W. Taeubner—Ordered motion for cancellation of bail, granted. (M)

1944

Dec. 20. Karl J. Boehm—Ordered motion for cancellation of bail, granted. (M)

Dec. 20. Ferdinand Fiswick—Ordered motion for cancellation of bail, granted. (M)

Dec. 20. Herman C. Koch—Ordered motion for cancellation of bail, granted. (M)

Dec. 20. Jacob F. Mayer—Ordered motion for cancellation of bail, granted. (M)

Dec. 20. Notice and Grounds of Appeal, filed, as to Fiswick, Mayer, and Rudolph.

Dec. 20. Karl Johann Boehm—Sentence, 6 months. (M)

Dec. 20. Ferdinand Fiswick—Sentence—18 months. (M)

Dec. 20. Ordered motion that the marshal keep the deft. Ferdinand Fiswick in Hudson County Jail until Dec. 28th [fol. 8] to determine if the defendant is to appeal, granted. (M)

Dec. 20. Herman Claus Koch—Sentence 6 months. (M)

Dec. 20. Jacob Friedrich Mayer—Sentence: One year and one day.

Dec. 20. J. F. Mayer—Ordered motion for $2500.00 bail surety of $1500 cash pending appeal, granted. (M)

Dec. 20. George Riemschneider—Sentence: 6 months. (M)

Dec. 20. Fritz Gustav Rudolph—Sentence: 18 months. (M)

Dec. 20. Fritz Gustav Rudolph—Ordered motion to place defendant under $2500.00 pending appeal, granted. (M)

Dec. 20. Ordered motion to lower the bail to $2000.00, granted. (M)

Dec. 20. Hans Wilhelm Schnoor—Sentence: 4 months. (M)

Dec. 20. Heinrich Carl Walter Taeubner—Sentence: 3 months. (M)

Dec. 21. Karl Johann Boehm—Judgment and Commitment, filed. (M)

Dec. 21. Heinrich C. W. Taeubner—Judgment and Commitment, filed. (M)

Dec. 21. Hans Wilhelm Schnoor—Judgment and Commitment, filed. (M)

Dec. 21. Fritz Gustav Rudolph—Judgment and Commitment, filed. (M)

1944

Dec. 21. George Riemschneider—Judgment and Commitment, filed. (M)

[fol. 9] Dec. 21. Jacob Friedrich Mayer—Judgment and Commitment, filed. (M)

Dec. 21. Herman Claus Koch—Judgment and Commitment, filed. (M)

Dec. 21. Ferdinand Fiswick—Judgment and Commitment, filed. (M)

1945

Jan. 3. Hans Wilhelm Schnoor—Copy of Judgment and Commitment with Marshal's return thereon, filed.

Jan. 3. Karl Johann Boehm—Copy of Judgment and commitment with Marshal's return thereon, filed.

Jan. 5. George Riemschneider—Copy of Judgment and commitment with Marshal's return thereon, filed.

Jan. 8. Ferdinand Fiswick—Copy of Judgment and Commitment with Marshal's return, thereon, filed.

Jan. 8. Herman Claus Koch—Copy of Judgment and Commitment with Marshal's return thereon, filed.

Jan. 11. Heinrich Carl Walter Taeubner—Copy of Judgment and commitment with Marshal's return thereon, filed.

Jan. 23. Order for preparation of Record on appeal, filed. (M)

Mar. 26. Bill of Exceptions, filed. (2).

[fol. 10] IN UNITED STATES DISTRICT COURT

INDICTMENT

UNITED STATES OF AMERICA,
District of New Jersey, ss:

In the District Court of the United States of America in and for the District of New Jersey at the April Term thereof, in the year 1944, Second Panel.

The Grand Jurors of the United States, duly impaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present,

That during the period between the 1st day of September, 1939, and the day of the finding and filing of this indictment and continuously from day to day during all such

period, in the City of Newark, County of Essex, in the State and District of New Jersey, and at divers other places within the said District of New Jersey and within the jurisdiction of this Court, and within the Southern District of New York and also within the Eastern District of New York and other Districts to the Grand Jurors unknown

Karl Johann Boehm, Walter Fritz Wilheim Burchardt, Ludwig Koenig, Gerhard Ewald Sprenger, Edgar M. Ulrich, Heinrich Dittmann, Carl Jaeger, Hedwig Dorothea Jaeger, Ernst Henry Nauert, Joseph Anton Berberich, Emil Wilheim Borchers, Ferdinand Fiswick, Erich Helimann, Herman Claus Koch, Jacob Friedrich [fol. 11] Mayer, Bernhard Wilheim Mueller, George Riemschneider, Fritz Gustav Rudolph, Hans Wilheim Schnoor, Albert Franz Schreiner, Else Erna Marie Schreiner, Heinrich Carl Walter Taeubner, Willy Max Zimmer, Wilhelm Christian Poehlmann, Arthur Curtis Langenberg, Wilheim Johannes Witt, Hans Gunther Bauer, Hans Herman Kiefer, Luise Otten, Walter Asmus Hansen, Karl Gerlach,

whose true and correct names other than hereinbefore stated are to the Grand Jurors unknown, hereinafter in this indictment sometimes called and referred to as the defendants, did knowingly, wilfully, unlawfully and feloniously combine, conspire, confererate and agree together and with each other, and with Friedhelm Draeger, Hans Vogel and Fritz Zeglin, and with the German Ambassador to the United States, and with members of his staff and with other representatives of the Third German Reich, being co-conspirators but not herein named as defendants, and with other persons to the Grand Jurors unknown, to defraud the United States of America of its governmental function in securing the full and complete listing and fingerprinting of all aliens residing and being within the United States, their true names, places of residence, nationality, date of entry into the United States, activities therein, criminal records, and membership in and affiliation with any clubs, societies and organizations devoted to furthering the political activities, [fol. 12] public relations and public policy of foreign governments, and their participation in the meetings and activities of such clubs, societies and organization-.

And the Grand Jurors do further present that during the Summer of 1941 and continuously for upwards — five years

immediately prior thereto, the said Friedhelm Draeger was the German Consul in the City of New York and Kreisleiter or leader of the Auslands or overseas portion of the National Sozialistische Deutsche Arbeiterpartei, hereinafter in this indictment called the Nazi Party in the United States; and throughout the same period of time Hans Vogel was Secretary to the said Friedhelm Draeger, and in such capacity was engaged in matters concerning and affecting the operation and conduct of the said Nazi Party and its members and activities within the United States.

That continuously since early in 1933, the said Nazi Party in the United States held and conducted meetings, celebrations, activities and other functions of a political and propaganda character for the purpose of furthering the political activities, public relations and public policy of the Government of the Third German Reich, and distributed and disseminated literature of like political and propaganda character and was organized and engaged in increasing its membership and influence and in furthering the cause of the said Third German Reich and the said Nazi Party under the leadership of which Adolf Hitler was the Reich Fuehrer; and was during such period an organization in the United States devoted to fostering, defending, advocating and furthering the political activities, public relations and public policy of the said Third German Reich and the said Nazi Party and Adolf Hitler.

That, among others, the aim and purpose of the said Nazi Party in the United States was to incul-ate and foster in German Nationals residing and being in the Unit-d States [fol. 13] and, through them, in others, of German ancestry, loyalty, obedience, support and obligation of service to the Fuehrer of all Germans, the Nazi Party and the Third German Reich.

That during the period of five years immediately preceding the Fall and early Winter of 1940, each of the defendants herein named was a German National residing in the United States and was a member of and affiliated with the said Nazi Party.

It was part of the said conspiracy and plan and purpose of the same that each of the defendants herein well knowing the foregoing, and being required pursuant to the provisions of the Act of Congress of the United States, known as the Alien Registration Act of 1940 (Section 453 *et seq.* Title 8 U. S. C.), and of the regulations issued and promul-

gated in pursuance thereof by the Commissioner of Immigration and Naturalization, with the approval of the Attorney General of the United States, would in such registration deny, falsify, conceal, misrepresent, mislead, disguise, deceive, fail to mention, equivocate and cover up by trick, scheme and device, material fact relating to the existence, kind and extent of each defendant's membership in connection and affiliation with their activities in and the activities of the said Nazi Party within the United States, during the five-year period immediately preceding such registration, to the end that each defendant's affiliation with, membership and activities in, and activities of the said Nazi Party within the United States would be denied, concealed, covered up, falsified, misrepresented, suppressed and disguised, and to the further end that the said United States, the Commissioner of Immigration and Naturalization, the Department of Justice, and other agencies and bureaus of the United States in the exercise of their governmental functions, be denied and have withheld from and be defeated in their effort to obtain accurate, complete, univo- [fol. 14] cal, honest and correct information sought and required in and by such registration, in a National emergency, which registration was for the purpose of ascertaining the identity, the location and activities of all aliens residing and being within the United States at the time of such registration and thereafter.

That is was a part of the said conspiracy that the United States, their agencies, departments and bureaus, in the exercise of their governmental functions, be defrauded, hampered, impeded, impaired, frustrated and obstructed as regards being supplied accurate, complete, univocal, honest and correct information concerning the defendants' membership and activities in, their affiliation with and the activities of the said Nazi Party, its clubs, organizations, functions and activities in the United States.

It was part of the said conspiracy that the said Freidhelm Drager, Hans Vogel, the German Ambassador to the United States and the members of his staff, and others to the Grand Jurors unknown, would advise, counsel, instruct, command and direct the said defendants and others similarly situated, and that these defendants and such others would accept such advice and counsel and follow such instructions, commands and directions, to deny, falsify, conceal, misrepresent, mislead, disguise, deceive, equivocate

and fail to state material facts and cover up by trick, scheme and device, their affiliation with the said Nazi Party and membership and activities therein, and the activities and functions of the said Nazi Party within the United States, on forms supplied by the United States, their agencies, departments and bureaus, for the registration of all aliens, pursuant to the provisions of the said Act of Congress, the Alien Registration Act of 1940, and the regulations issued and promulgated in pursuance thereto.

It was part of the said conspiracy that these defendants and other members and affiliates of the said Nazi Party [fol. 15] within the United States, would continue after the Fall and early Winter of 1940, and from day to day thereafter, to deny, falsify, deceive and misrepresent to the United States their agencies, departments and bureaus, the material facts relating to the existing kind and extent of their membership and activities in, affiliation with, and the existence and activities and functions of the said Nazi Party within the United States, to the end that the said denials, concealments, falsifications, misrepresentations, suppressions and equivocations made in connection with the said Act of Congress, the Alien Registration Act of 1940 as aforesaid, would continue thereafter to the detriment and failure of the said United States and their agencies, departments and bureaus, to ascertain fully, fairly and accurately during a National emergency, information relating to the membership, policy and activities of these defendants and others in the said Nazi Party in the United States, and for the furtherance of the political activities, public relations, public policy of the Government of the Third German Reich, all of which said information in said form under said Act of Congress was vital to the internal security of the United States.

It was further part and parcel of the said conspiracy, and as a means of carrying same into effect, that the said defendants, individually, would come and appear before proper alien registration officers and authorities, for the purpose of registration, and in such registration would falsely and fraudulently omit to disclose and truly state their membership and connection and affiliation with the clubs, societies, organizations and activities of the Nazi Party within the United States.

[fol. 16] Overt Acts

And in pursuance of and in order to effect the objects of the said conspiracy at the times and places hereinafter mentioned in connection with their respective names, certain of the said defendants did do and perform the following Overt Acts:

1. That on or about November 1, 1940, Friedhelm Draeger called a meeting of certain members of the Nazi Party at the office of the German Consulate at 17 Battery Place, New York City, New York.

2. On or about December 18, 1940, Friedhelm Draeger, in New York City did instruct Walter Fritz Wilhelm Burchardt to write a certain letter to the Alien Registration Division of the Immigration and Naturalization Service, United States Department of Justice, Washington, D. C.

3. On or about the 15th day of November, 1940, Friedhelm Draeger and Hans Vogel did call a meetting of certain members of the Nazi Party in the United States, at the office of the German Consulate at 17 Battery Place, New York, and did instruct the members to deny on the Alien Registration Form membership in the Nazi Party.

4. On or about February 19, 1940, Friedhelm Draeger and Hans Vogel did apply for a permit to the City of New York for a license to conduct a motion picture show under the auspices of the German-American Festival Committee.

5. On or about March 8, 1940, Friedhelm Draeger and Hans Vogel did conduct a meeting at the New York Turn Halle in New York City.

6. That during the month of December, 1940, Friedhelm Draeger, Hans Vogel and Fritz Zeglin did instruct certain members of the Nazi Party in the United States to deny [fol. 17] membership in said Party on Alien Registration Forms.

7. That during the early part of November, 1940, Hans Vogel did instruct one Karl Johann Boehm to list on his Alien Registration Form that he was a member of the Reichsdeutsche Vereinigung, and to state that the same was a social club.

8. That on or about the early part of November, 1940, in New York City, Hans Vogel did instruct Karl Johann

Boehm to state in answer to question No. 10 in his Alien Registration Form that he was a non-resident member of the National Sozialistische German Labor Party, and to answer question No. 15 in said form, "have not."

9. That on or about December 6, 1940, in West New York, New Jersey, Karl Johann Boehm did file Alien Registration Form No. 4671761, and did state that he was a non-resident member of the National Sozialistische Labor Party of Germany.

10. On or about the 15th day of September, 1940, in New York City, at the office of the German Consulate at 17 Battery Place, Hans Vogel did instruct one Emil Wilhelm Borchers to deny that he was a member of the Nazi Party.

11. That on or about December 16, 1940, Emil Wilhelm Borchers, at North Bergen, New Jersey, did file Alien Registration Form No. 5267515.

12. That on or about September 15, 1940, at the office of the German Consulate in New York City, Friedhelm Draeger did instruct Emil Wilhelm Borchers to turn in his Nazi Party membership book.

13. That in the early part of December, 1940, Friedhelm Draeger did instruct Joseph Anton Berberich to deny that [fol. 18] he was a member of the Nazi Party on his Alien Registration Form.

14. On or about December 16, 1940, Joseph Anton Berberich did file Alien Registration Form No. 5632580 at Union, New Jersey.

15. On or about December 16, 1940, Friedhelm Draeger sent a certain letter to Herman Claus Koch, requesting that he report to the German Consulate in New York City and take with him his Alien Registration Form.

16. On or about December 18, 1940, at Newark, New Jersey, Herman Claus Koch did file Alien Registration Form No. 4793382.

17. On or about the early part of December, 1940, Hans Vogel, at the office of the German Consulate in New York, did give to Jacob Friedrich Mayer, a slip of paper containing the answers that Jacob Friedrich Mayer was to insert in answer to questions No. 10 and No. 15 of Alien Registration Form under Registration Act of 1940.

18. On or about December 23, 1940, Jacob Friedrich Mayer did file, Hackensack, New Jersey, Alien Registration Form No. 4572339.

19. On or about November 15, 1940, Hans Vogel did confer with Ludwig Koenig in the office of the German Consulate in New York City, and did instruct Ludwig Koenig in the manner in which to answer questions No. 10 and No. 15 of Alien Registration Form.

20. On or about November 15, 1940, Hans Vogel did instruct Ludwig Koenig to deny membership in the Nazi Party.

21. On or about December 12, 1940, Ludwig Koenig did file Alien Registration Form at Elizabeth, New Jersey.

[fol. 19] 22. On or about November, 1940, Friedhelm Draeger and Hans Vogel did instruct Gerhard Ewald Sprenger in the manner to file Alien Registration Form.

23. On or about December 14, 1940, at Washington, D. C., Gerhard Ewald Sprenger did file Alien Registration Form.

24. On or about December 26, 1940, Carl Jaeger did file Alien Registration Form No. 5717053 and did fail to state therein he was a member of the Nazi Party in the United States.

25. On or about November, 1940, Ferdinand Fiswick did attend a meeting at the office of the German Consulate in New York City.

26. On or about December 4, 1940, at West New York, New Jersey, Ferdinand Fiswick did file Alien Registration Form and did fail to state that he was affiliated with the Nazi Party in the United States.

27. On or about November 26, 1940, Bernhard Wilhelm Mueller did file Alien Registration Form No. 4340467 at Union City, New Jersey, and did fail to state therein that he was a member of the Nazi Party in the United States.

28. On or about December 26, 1940, George Riemschneider did file Alien Registration Form No. 5542997, at Passaic, New Jersey, and did fail to state that he was a member of the Nazi Party and affiliated with same.

29. On or about the early part of October, 1940, George Riemschneider did burn his Nazi Party membership book.

30. On or about October 15, 1940, Hans Vogel did instruct Hans Wilhelm Schnoor to keep his membership in the Nazi party a secret.

[fol. 20] 31. On or about December 9, 1940, Hans Wilhelm Schnoor did file Alien Registration Form No. 5608681, and did fail to state therein that he was a member of the Nazi Party in the United States.

32. On or about October, 1940, at New York City, in the office of the German Consulate, Fritz Gustav Rudolph was advised by Friedhelm Draeger and Hans Vogel to deny membership in the Nazi Party on Alien Registration Form.

33. On or about December 3, 1940, Fritz Gustav Rudolph did file Alien Registration Form No. 5300560.

34. On or about the month of July, 1938, at the office of the German Consulate in New York City, Arthur Curtis Langenberg did join and become a member of the Nazi Party in the United States.

35. On or about the early part of September, 1940, Arthur Curtis Langenberg did receive a letter from the German Consulate, requesting him to call at the office of the German Consulate in New York City.

36. On or about December 6, 1940, Arthur Curtis Langenberg did file Alien Registration Form at Toms River, New Jersey, and did fail to state that he was a member of the Nazi Party in the United States and affiliated with same.

37. On or about the months of June and July, 1940, Friedhelm Draeger and Hans Vogel did order card index of membership of party members of the Nazi Party destroyed.

38. On or about the month of November, 1940, Karl Gerlach did confer with Hans Vogel in the office of the German Consulate at 17 Battery Place, New York City.

[fol. 21] 39. On or about the month of November, 1940, Hans Vogel did instruct Karl Gerlach not to mention on the 1940 Alien Registration Form that he was a member of the Nazi Party.

40. On or about November 27, 1940, Karl Gerlach did file Alien Registration Form with the Department of Immigration and Naturalization Service and did fail to state that he was a member of and affiliated with the Nazi Party in the United States; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Thorn Lord, United States Attorney.

[fol. 22] IN UNITED STATES DISTRICT COURT

Testimony

APPEARANCES:

Frederic M. P. Pearse Esq. for the defendants Ferdinand Fiswick, Wilhelm Christian Poehlmann and Walter Asmus Hansen.

Frank W. Jackson Esq. for the defendant Jacob Friedrich Mayer.

James P. Lordi Esq. for the defendant Fritz Gustav Rudolph.

William H. Campbell Esq. for the defendant Ernst Henry Nauert.

William V. Azzoli Esq. for the defendants Edgar Ulrich and Willy Max Zimmer.

A. S. Gechtman Esq. for the defendant Walter Fritz Wilhelm Burchardt.

Francis W. Hayden Esq. for the defendant Arthur Curtis Langenberg.

Tried before Hon. Thomas F. Meaney, Judge, and a Jury, at the Federal Building, Newark, N. J., on Monday, November 27, 1944, et seq.

* * * * * * *

LILLY ILLIAN, called and sworn on behalf of Government, testified as follows:

Direct examination.

By Mr. Stanziale:

Q. Miss Illian, before you testify will you try to raise your voice so that everyone in the jury box can hear you?
A. Yes.

[fol. 23] Q. Thank you very much. Where were you born, Miss Illian?

A. I was born in Germany.

Q. When did you come into the United States?

A. In 1936.

• • • • • • •

Q. Were you ever employed by the German Consul?

A. What do you mean?

Q. Well, were you ever employed at the offices of the German Consulate?

A. Yes.

Q. Can you tell us when?

A. I was employed at the German Consulate, here in New York, from March 1939.

Q. Until when?

A. Until May, 1941.

• • • • • • •

Q. Will you repeat that?

A. I worked at the German Consulate, in New York, from 1939 until May, 1941.

Q. I see. Can you tell us when in 1939 you began your employment there?

A. In March.

Q. I see. And where were the offices of the German Consulate located?

A. 17 Battery Place.

Q. In New York?

A. In New York.

Q. Who hired you, Miss Illian?

A. I was hired by Consul Schmidt.

Q. And did you know or do you know Dr. Friedhelm Draeger?

A. Yes.

Q. When is the first time you met Dr. Friedhelm Draeger?

A. After I was hired I was referred to his department.

Q. You were referred to his department?

A. Yes.

Q. And where was his department located?

A. At the German Consulate.

Q. Now, do you know what connection Dr. Draeger had at the German Consulate office; what were his duties there?
A. I don't know all of his duties.

• • • • • • • •

[fol. 24] The Court: Well, did you work in the office there?
The Witness: In Mr. Vogels' office, he was his secretary.

• • • • • • • •

Q. What was Mr. Vogel's full name?
A. I think Hans Vogel.
Q. And when did you meet Hans Vogel?
A. At the time I was hired.
Q. In March, 1939?
A. Yes.
Q. So that you met Draeger and Vogel at the same time?
A. Yes.
Q. Who else was working with you there?
A. There was Miss Maria Koch, also a stenographer, and Miss Cleo Koch, who was at present a secretary of Dr. Draeger.
Q. Can you tell us what you did at the office of the German Consulate at 17 Battery Place?
A. Yes.
Q. Tell us.
A. I took——

• • • • • • • •

A. My duties were I took dues.
Q. From whom?
A. From members.

The Court: Just a minute, let her tell it.
Mr. Stanziale: Your Honor please, I think I have a right to ask at this particular time from whom.
The Court: You took dues. Go ahead.

A. (Continuing:) I took dues from the members of the National Socialist Party and took care of correspondence that was dictated to be pertaining to it.

• • • • • • • •

[fol. 25] Q. Who dictated to you, Miss Illian?
A. Mr. Vogel.
Q. Mr. Vogel?

A. Yes.
Q. Did you ever receive any dictation from Dr. Draeger?
A. I think a few times, very seldom.
Q. What did the dictation pertain to?

Mr. Pearse: I object.

* * * * * * *

Mr. Pearse: Judge, I am objecting because the time has not been fixed as to when the dictation took place.

The Court: Do you recall the time when Dr. Draeger dictated letters to you?

The Witness: No.

The Court: During the period of your employment, was it?

The Witness: Yes.

Q. Now, the question is; can you tell us what the dictation pertained to?

* * * * * * *

Do you recall specifically any dictation that Dr. Draeger gave you giving your best recollection; first if you recall it?

The Witness: Yes, I recall it.

The Court: Now, suppose you tell us the dictation that he gave you, as well as you can recollect it, not in his exact words unless you can recall them, but your best recollection of what he dictated.

The Witness: I recall letters he dictated to me addressed to the A. O. in Germany, about members who returned to Germany.

The Court: About what?

The Witness: Members who——

[fol. 26] The Court: The A. O.?

The Witness: Yes.

The Court: What is that?

The Witness: Organization.

The Court: Auslands Organization?

The Witness: Yes.

The Court: About the status of——

The Witness: Returning members.

The Court: Returning from where to where?

The Witness: From United States to Germany permanently.

Q. And when you refer to members, Miss Illian, members of what.

A. Of the National Socialist Party.

Q. Is that the Nazi Party?

A. Yes.

Q. Now, Miss Illian, can you tell us who Dr. Draeger was at the Consulate Office at 17 Battery Place in New York; what was he doing there?

A. I don't know his exact work.

The Court: What was his official status?

Q. What was his status?

A. He was Consul and Kreisleiter.

Q. Kreisleiter of what?

The Court: What does "Kreisleiter" mean?

The Witness: I could translate it "District Leader."

The Court: What was he District Leader of?

The Witness: He was the head of the Party.

The Court: Of the National Socialist Party?

The Witness: Yes.

The Court: Where?

The Witness: In New York.

[fol. 27] Q. He was the head of the National Socialist Party in New York. All right. Now, what was Hans Vogel?

A. He was Dr. Draeger's secretary.

Q. In connection with the activities of the Nazi Party?

A. Yes.

Mr. Pearse: I object to that, putting words in her mouth.

The Court: Well, if the Doctor was head of the Nationalist Socialist Party in New York and his headquarters were 17 Battery Place and Hans Vogel was his secretary at the same place, I don't see any particular harm done in the slightly leading question which was asked by the United States Attorney.

Mr. Pearse: If the Court please, the reason I objected was she stated that Draeger occupied two capacities; one was Consul and the other was whatever that German name is, and she also said that Vogel was his secretary, but she didn't say in which capacity.

The Court: Now, are we going to fight along that line? We are going to get through this case at the earliest possible moment and I don't want factitious objections—not

that I am denominating yours as that, but it might very well become that.

Was Vogel secretary to Draeger?

The Witness: Yes.

The Court: As what, as Consul or Kreisleiter or what?

The Witness: I don't know; I only know the title was Consul and Kreisleiter.

The Court: Consul and Kreisleiter, and Vogel was his secretary. All right, go ahead.

[fol. 28] Q. Can you tell us in what work Hans Vogel devoted his whole time?

A. Pertaining to Party matters.

The Court: When you say "Party matters," what Party?

The Witness: National Socialist Party.

The Court: National Socialist Party.

Q. I believe you stated at the outset that you collected dues from Party members, is that correct?

A. Yes.

Q. Where were the dues paid?

A. Partly at the German Consulate and by mail.

The Court: By mail received at the German Consulate?

The Witness: Yes.

The Court: And sometimes in person at the German Consulate?

The Witness: Yes.

The Court: Is that what you mean?

The Witness: And sometimes at festivity in the Turn Hall.

The Court: Turn Hall where?

The Witness: Turn Hall in New York.

Q. Who held the festivities?

A. The German Consulate.

Q. Under what auspices?

A. Well, the German Consulate held them.

Q. Was there any particular name of who was holding the festivity?

A. No, not that I know.

Q. You say that money for the tickets was also received there at the German Consulate?

A. Yes.

[fol. 29] Mr. Pearse: Now, I don't understand that money for the tickets——

The Court: The dues were received at the festivities.

Q. Now, did you collect dues personally?
A. Yes.
Q. Did you receive any instructions as to what you should do with the dues collected at the time that you became employed at the German Consulate?
A. I kept a record of it.

The Court: What did you do with the money and the checks if there were checks?
The Witness: I put it in the cash box.
The Court: At the Consulate?
The Witness: Yes.
The Court: You kept a record of the payments?
The Witness: Yes.

Q. You kept a record of the payments?
A. Yes.
Q. All right. Now what, if anything, was given to the party member paying his dues as a receipt for the payment?
A. They were either given stamps or receipt.
Q. Where did the stamps come from?
A. Germany.
Q. Now, where would the stamps be placed, do you know, that the member received?
A. Either a membership card or book.
Q. Now, were there any applications for membership at the German Consulate Office, while you were employed there?
A. Yes.
Q. Who took the applications for membership to the Nazi Party at the German Consulate Office while you were there?
A. Mr. Vogel.
Q. Mr. Vogel?
A. Yes.
[fol. 30] Q. Can you tell us what, if anything, was done with the application for membership after it had been received by Mr. Vogel?
A. It was sent to Germany with a report.
Q. A report by whom?
A. Made by Dr. Draeger.

Q. What did the report relate to?

A. It related to the forms that were filled out and to this particular person who had to give reference in Germany.

Q. Was it necessary for an applicant to the Nazi Party in the United States to give references as to persons living in Germany.

Mr. Pearse: If she knows.

A. Yes.

Q. And how many references were required in Germany?

A. Two.

Q. Were there any references required of an applicant as to persons living in the United States?

A. Yes, also two.

Q. Also two. So that it was necessary to have two references in the United States and two in Germany?

A. Yes.

Q. Now, the references related to what, Miss Illian; why were the references necessary, for what purpose was the reference required, to certify as to what?

Mr. Pearse: If the Court please, if they are in writing I should think the writings ought to be produced unless their absence can be explained.

The Court: Have you any of the writings, Mr. Stanziale?

Mr. Stanziale: We have application blanks, sir.

Q. Can you tell us——

Mr. Pearse: I still say the writings are the best evidence.

Mr. Stanziale: I am coming to that. Your Honor please, may I make this statement to the Court: Exhibits that I am [fol. 31] going to have, these are the same exhibits that have been used in another trial, not against these defendants and they have the identification number of this other court. May I ask that the number remain of these particular exhibits so that there will be no mistake as to the exhibit number of the document which related to this other court?

The Court: Any objection?

Mr. Pearse: I don't think so, I think it will work out all right except that we are starting a confusion worse confounded by our first exhibit.

The Court: Why can't we just have a notation of our own on it.

(Side bar colloquy.)

Mr. Stanziale: Your Honor please, before going into the exhibit may I ask a question relating to another phase, because I want to put in the exhibits at one time; may I be permitted to do that?

The Court: Yes.

Q. Miss Illian, can you tell us what records were kept at the Consulate Office when you started to work there in March of 1939 relating either as to the members or to applications for membership?

A. There were file cards and files.

Q. And what?

A. And files, folders.

Q. Now, what did the file cards contain?

The Court: Well, do you have samples of them?

Mr. Stanziale No, your Honor.

Mr. Pearse: Well then, I submit——

Mr. Stanziale: I will have proof as to what happened to the file cards, if your Honor please.

The Court: Proceed.

[fol. 32] Q. Can you tell us what the file cards contain?

A. I can recall some of it.

Q. Tell us what you recall.

A. Name of this person, his birthday, his occupation, his address and receipt for the payment of dues.

Q. Anything else contained on that?

A. I don't recall anything else at the moment.

Q. Was there any personal history?

A. No.

Q. Now, what was the initiation fee into organization, how much was it?

A. The initiation fee was one dollar.

Q. Were there other fees?

A. Yes.

Q. What did the total amount aggregate?

A. The total amount was, most of the time, fifteen dollars and fifty cents.

Q. Is that fifteen dollars and fifty cents?

A. Yes.

Q. Can you break that up, tell us how much was for initiation fee and what the other cost was?

A. Yes; the initiation fee was one dollar. The so-called Auslands Ausweis.

The Court: What is "Auslands Ausweis"?
The Witness: I don't want to translate it please.
The Court: You are not sure of the meaning in English.
Mr. Pearse: Identification, they tell me over here, Judge.
The Court: I don't know; is that what it means?
The Witness: Yes.

Q. What does "Auslands" mean, foreign?
A. Foreign country.
Q. What is that?
A. Foreign.
Q. And "Ausweis" is that identification?
A. Yes.
[fol. 33] Q. So Auslands Ausweis is foreign identification?
A. Yes.
Q. How much was charged for that?
A. $1.50.
Q. $1.50?
A. I say either one of these was one dollar and $1.50.

The Court: And what was the rest of the money for?
The Witness: Three months in advance for dues.
The Court: How much did the dues amount to?
The Witness: One dollar per month. And once it was called—I don't know how to transulate these things.
The Court: Just give us the German.
The Witness: Werbebeitrag.

Q. Can you tell us your best translation of that?

The Court: Never mind it, she has asked not to.

Q. What was charged for that?
A. Most of the time $10.
Q. Can you tell us whether that charge of $10 related to propaganda activities?
A. I don't know what it was used for.
Q. What evidence of membership did full Party members have?
A. Full party members had either membership cards or books.

Q. Or books?
A. Yes.
Q. Where did the books come from?
A. From Germany.

Q. Were the books endorsed by anyone here?
A. I think Dr. Draeger wrote his name.
Q. Can you tell us what applicants for membership in the Nazi Party were called?
A. Parteianwaerter.

The Court: Partei——
The Witness: Parteianwaerter.

[fol. 34] Q. What evidence did applicants for membership in the Nazi Party receive?
A. Parteianwaerter card.
Q. Where was the card issued, Miss Ilian?
A. This card was filled out at the Consulate.
Q. In other words, this card did not come from Germany, the card would be given by the Consul here?
A. There were several blank forms of this card, I don't exactly know where it came from.

The Court: It was filled out at the Consulate in New York, is that right?
The Witness: Yes.
Mr. Stanziale: I ask that this certificate be marked for identification at this time G-2.
(Marked G-2 for Identification.)

Q. Miss Illian, I show you an exhibit which is marked G-2 for Identification and I ask you if you recognize this exhibit?
A. I recognize the card and the application form.
Q. What does the exhibit relate to, what is it?

Mr. Pearse: It speaks for itself.
The Court: It is part of the application form. Application form for what?
The Witness: For membership in the National Socialist Party.

Q. At this point, Miss Illian, did you ever take applications for membership in the National Socialist Party while you were working for the German Consulate?
A. Yes.
Q. You did?
A. I filled out some forms. I mean, one form was kept in the office all the time.
Q. And the other form?

A. Was given to the person to fill out and bring it into the Consulate.

[fol. 35] Q. That is the form that you testified to that references were necessary here; is that the same form?

The Court: Which is this form just shown to you, is that the one that was kept in the office all the time or the one given to the applicant?

The Witness: This was given to the applicant and this form was sent to Germany with the report from Dr. Draeger.

Mr. Stanziale: Now will you mark this G-3 for Identification?

(A paper is marked G-3 for identification.)

Q. Now, I understand you to say, Miss Illian, that the application form, one of the forms, was sent to Germany with a personal history; is that correct?

Mr. Pearse: She didn't say that.

The Court: The forms filled in by the applicant were sent to Germany. What was sent with that?

The Witness: Only two of these forms. The other forms they kept at the office and there was a report sent in by Dr. Draeger to Germany.

The Court: There were two forms and a report by Dr. Draeger?

The Witness: Yes.

Q. Very well. I show you exhibit marked G-3 for Identification and ask you if you recognize that form?

A. This is also form that came in to the application for membership.

Q. Now, can you tell us what was done with that form?

A. This form also was sent to Germany.

The Court: Who filled it out before it was sent?

[fol. 36] The Witness: The applicant.

The Court: Does that constitute now the two forms that were sent to Germany with a report by Dr. Draeger?

The Witness: Yes.

Mr. Stanziale: Mark this exhibit, please.

(An exhibit is marked G-4 for Identification.)

Q. Miss Illian, I show you an exhibit that is marked G-4 for Identification——

Mr. Stanziale: Would you mind putting a pin here?

Q. (Repeating) I show you an exhibit that is marked G-4 for Identification; do you recognize that form?

A. Yes; this form was filled out in the office of the Consulate.

Q. Filled out by whom, Miss Illian?

A. Sometimes by Mr. Vogel, sometimes by Miss Koch or by me.

Q. And what does that form relate to, what is the form?

A. It relates, also, it is pertaining to application for membership.

Q. Now, was that particular form sent to Germany or was it retained at the office of the Consulate here?

A. That was retained in the office at the Consulate.

(A paper is marked G-5 for Identification.)

Q. I show you Exhibit marked G-5 for Identification and ask if you recognize this exhibit?

A. This is also one part of the application form.

Q. Signed by whom?

A. Signed by the applicant.

The Court: And what disposition was made of that?

[fol. 37] The Witness: It was kept in the office of the Consulate.

Q. Can you tell us what the form relates to, Miss Illian?

A. It related to whether or not this person is particular person that was a member of the German-American Bund.

(A paper is marked G-6 for Identification.)

The Court: Will you excuse me, I will have to recess for about two minutes, so I will tell you what we will do. We will recess now until a quarter before two and the jury will be excused first with the admonition not to discuss the case with anyone.

Mr. Pearse: Will you ask them not to read the newspapers, Judge?

The Court: Yes, I will ask you please to be so good as to avoid reading any newspaper comment. You will recognize it from the head and you will know more about the case than

any newspaper man will know, so you don't have to read it. There may be comments in there that might be prejudicial, so please don't read them.

Mr. Azzoli: Did your Honor say quarter before two? I made arrangements from one to two——

The Court: Well, in your absence Mr. Pearse will take care of your interests.

(Noon Recess.)

[fol. 38] (Afternoon Session)

LILY ILLIAN resumed the stand.

Direct examination (continued).

By Mr. Stanziale:

Q. Miss Illian, I show you an exhibit that is marked G-6 for Identification and I ask if you recognize that exhibit?

A. Yes, it is also a part of the application blank.

Q. A part of the application blank?

A. Yes.

Q. What part of the application does Exhibit G-6 for Identification refer to?

Mr. Pearse: Well, doesn't it speak for itself, if the Court please? I object.

The Court: The only difficulty about letting these things speak for themselves is we may as well have them identified now and know what they are so that we won't have to go all over the whole thing. What is it; tell us what it is.

The Witness: I mean, do you want the translation of it?

The Court: What is "Versicherung"?

The Witness: "I declare."

Mr. Pearse: If the Court please, I understand Mr. Stanziale has translations of all these; I am quite sure we won't object to them if he will bring them right on now. If we have any comment to make on them later we will do it if the Court will let us.

Mr. Stanziale: That will have to go back to 2, 3, 4, 5 and 6. This is a translation of the exhibit, your Honor.

The Court: Do you want to look at this translation before I refer to it?

Mr. Pearse: Oh, no, sir.

[fol. 39] The Court: No, I mean before I refer to it—I think it is a good translation but my German is sketchy.

Mr. Pearse: I think Mr. Cole is quite a linguist. Judge, Mr. Stanziale told me that Mr. Hunt had translated these things.

The Court: The translation of this—see if it agrees with your translation—"I hereby declare on my word of honor that I do not belong to the Rotary Club."

The Witness: That's right.

The Court: And that had to be signed by——

The Witness: By the applicant.

Mr. Stanziale: Mark this for identification.

(An exhibit is marked G-7 for Identification.)

Mr. Stanziale: I will put the translation with it.

By Mr. Stanziale:

Q. Miss Illian, I show you the exhibit marked G-7 for Identification and ask you if you recognize that exhibit?

A. Yes.

Q. What is it?

A. That is the Auslands Ausweis I referred to before.

Q. The foreign identification certificate?

A. Yes.

Q. Now, who received that exhibit?

Mr. Pearse: I object, if the Court please, to the form of that question, who received it.

Mr. Stanziale: I withdraw——

Mr. Pearse: There are certain defendants here on trial, I should think the question was whether they received it.

Mr. Stanziale: I withdraw the question and will reframe it.

[fol. 40] Q. Can you tell us under what circumstances the Auslands Ausweis certificates were issued? Do you understand my question?

A. Not quite. I only know that they came from Germany.

Q. I see. They were received where?

A. At the Consulate.

Q. Can you tell us to whom the Auslands Ausweis certificates would be given?

A. To the members.

Q. To the members. And when you say members you mean members of the Nazi Party?

A. Yes.
Q. Very well.

Mr. Stanziale: May I have this marked?

(The paper is marked G-8 for Identification.)

Mr. Stanziale: Together with the translation which is attached.

Q. I show you an exhibit which is marked G-8 for Identification and ask if you recognize that exhibit?
A. This is membership card.
Q. Membership of what?
A. Of the National Socialist Party.
Q. Is that the full membership card?
A. Yes.
Q. Very well.

(A paper is marked G-9 for Identification.)

Q. I show you an exhibit that is marked G-9 for Identification and ask you if you recognize that exhibit?
A. Yes.
Q. What is that exhibit?
A. That is a card that was issued at the Consulate.
Q. To whom?
A. To this person.
Q. I understand that, but what was he, a member or an applicant?
A. He was a member.
[fol. 41] Q. And what purpose did the card serve?
A. Well, this member had given in his membership card in order to get the book, and for this card he got this card.
Q. In other words, when the book was turned in?
A. No, when the membership card——
Q. When the membership card was turned in, that is the applicant's card?
A. No.
Q. What kind of card?
A. Membership card I just said.
Q. The membership card which is Exhibit G-7?
A. Yes.
Q. And that would be given in place of it?
A. Yes.
Q. What purpose did Exhibit G-9 serve?
A. The person kept this until he received his book.

Q. What kind of book?
A. Membership book.
Q. Membership book to the Nazi Party?
A. Yes.

(A paper is marked G-10 for Identification.)

Q. Now, I show you an exhibit which is marked G-10 for Identification and ask you if you recognize that exhibit?
A. Yes.
Q. What is that exhibit?
A. Membership book.
Q. Membership book to what?
A. Membership in the Nazi Party.
Q. Is that the full membership book that was received by a member?
A. This is a membership book.
Q. I understand. Now, can you tell us where the membership book came from?
A. From Germany.
Q. And can you tell us where it was given to the member or by whom it was given to the member?
A. As far as I know, by Dr. Draeger.

The Court: Well, where?
The Witness: At the Consulate.
The Court: The Consulate in New York?
The Witness: Yes.

(A paper is marked G-11 for Identification.)

[fol. 42] Q. Now, can you tell us whether you recognize G-11 for Identification?
A. That is a receipt.
Q. A receipt for what?
A. I don't know what this receipt is for because it just says the amount paid.
Q. The amount paid. Now, is there anything in Exhibit G-11 for Identification in your handwriting?
A. No.

The Court: Do you know any handwriting on here?
The Witness: Yes.
The Court: What handwriting do you recognize?
The Witness: Dr. Draeger and Mr. Vogel.
The Court: And you are familiar with their signatures?
The Witness: Yes.

The Court: And you know that they are the signatures here?

The Witness: They look like it.

Q. Now, in the back of the exhibit is there any handwriting that you recognize or is there any handwriting?

A. Yes, there is handwriting but not mine.

Q. It is not yours?

A. No.

The Court: Do you recognize whose handwriting it is?

The Witness: It might be Miss Koch.

The Court: Well, you don't know. It is the date, that's all.

(A paper is marked G-12 for Identification.)

Q. Do you recognize G-12 for Identification?

A. Yes.

Q. What is G-12 for Identification?

A. That is also a receipt.

Q. Signed by whom?

A. By Dr. Draeger and Mr. Vogel.

[fol. 43] Q. Can you tell us what the receipt refers to?

A. It refers to paid membership dues.

Q. It refers to paid membership dues of whom? When you say "members," you mean members of the Nazi Party?

A. It could be either a member or prospective member; I don't know.

Q. When you say prospective member you mean an applicant for membership to the Nazi Party?

A. Yes.

Q. Very well.

(A paper is marked G-13 for Identification.)

Q. I show you an exhibit marked G-13 for Identification and ask you if you recognize that exhibit?

A. Yes.

Q. What is that exhibit?

A. A receipt.

Q. A receipt for what?

A. For paid membership dues.

Q. Now, I ask you to refer to the back of this Exhibit, Miss Illian, and ask you if you recognize any stamps that appear thereon?

A. Yes.

Q. What are those stamps?

A. Those stamps are given out for membership dues.

Q. Given out for membership dues?

A. Yes.

Q. Now, how much does each stamp represent towards membership?

A. Well, it is stamped on it one dollar or fifty cents.

Q. One dollar or fifty cents.

The Court: These are one-dollar stamps.

Q. Very well. Those are the forms of stamps that were given when membership dues were paid?

A. Yes.

(A paper is marked G-14 for Identification.)

Q. I show you a paper marked G-14 for Identification and ask you if you recognize that exhibit?

A. Yes.

[fol. 44] Q. What is that exhibit?

A. It is information about persons returning to Germany.

Q. Information referring to the person returning to Germany. What, if anything, would be used or what, if anything, would be done with such an exhibit; where would it be sent?

A. This wasn't sent anywhere.

Q. I know, but what would be sent; was a like exhibit sent to Germany?

A. No.

Q. I see.

A. There was a report made up from things like these.

Q. A report was made up from an exhibit such as that and sent to Germany?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Very well. Referring again to Exhibit G-14 there appears the name "Illian." Is that in your handwriting?

A. Yes.

Q. Do you remember when that signature was put on there?

A. Yes, the date is on.

Q. What date?

A. The 11th of February, 1941.

Q. Can you tell us why the signature was put on the exhibit?

A. Yes.

Q. Why?

A. Well, this person came into the office while Mr. Vogel was out and I took the information down and gave it to him.

(A paper is marked Exhibit G-15 for Identification.)

Q. I ask you if you recognize Exhibit G-15 for Identification?

A. Yes; this is a draft of a report made by Dr. Draeger and sent to Germany.

Q. In other words, as to activities here reports would be sent by Dr. Draeger from the United States to Germany; is that right?

[fol. 45] Mr. Pearse: I object to the form of that question.

A. No, this is only——

The Court: Wait a minute. What do you mean, it is leading?

Mr. Pearse: Yes, and activities, I don't know what he is talking about, the report speaks for itself, if it is a report.

The Court: Well, what is it?

The Witness: It is a draft about a returning member.

Court: It is a draft of what?

The Witness: Of a report made by Dr. Draeger about a returning member.

Mr. Pearse: That has got nothing to do with any activity, Judge; I object to the question.

The Court: It might be one of Dr. Draeger's activities.

Mr. Pearse: That isn't the way he put it.

(A paper is marked G-16 for Identification.)

Q. I show you a paper, Miss Illian, marked G-16 for Identification; will you tell us if you recognize that exhibit?

A. Yes.

Q. What is that, Miss Illian?

A. It is a letter written Mr. Kapp in the German Consulate in Cleveland.

Q. Signed by whom?

A. It isn't signed by anybody, it is a draft.

Q. Of what?

A. A letter to Mr. Kapp in Cleveland.

Q. Can you tell us who it relates to?
A. Do you want me to translate that?

[fol. 46] Mr. Pearse: I object to what it relates to.
The Court: Is there a translation attached?
Mr. Stanziale: Yes.

Q. Now, referring again to Exhibit G-16 for Identification, there is certain written matter written thereon. Can you tell us in whose handwriting that matter is?
A. It looks like Mr. Vogel's handwriting.
Q. Were all letters signed by either Dr. Draeger or Mr. Vogel ending "Heil Hitler," if you can tell us?

Mr. Gechtman: I object.
The Court: What do you mean, all letters that she knows about?
Mr. Stanziale: I will reframe it.
Mr. Pearse: Oh, we don't object.
Mr. Stanziale: I prefer——
The Court: All letters that you knew about that went out of that office officially were signed by whom?
The Witness: Either Dr. Draeger or Mr. Vogel.
The Court: And did they all end with "Heil Hitler"?
The Witness: Most of them did, I don't know whether all of them did.
The Court: All that you saw or most?
The Witness: No, there was another phrase.
The Court: Another phrase?
The Witness: "Mit Deutschtum Gruss."
The Court: "Mit Deutschtum Gruss."
The Witness: Yes—"With German Greetings."

(A paper is marked G-17 for Identification.)

Q. Miss Illian, I show you Exhibit which is marked G-17 for Identification and I ask you to look at this exhibit and tell us if you recognize this exhibit?
A. Yes.
[fol. 47] Q. Now, what is that exhibit?
A. A list of names.
Q. A list of names of whom?

Mr. Gechtman: I object to that, your Honor; I should like to have that list identified first as to who made it and when it was made.
The Court: Did you ever see that list before?

The Witness: Yes.

The Court: Where did you see it?

The Witness: I have seen it at the Consulate, I have worked on it and my handwriting is on it.

Mr. Pearse: What is that?

The Court: She says, "I worked on it and my handwriting is on it." Now, tell us what that is a list of.

Mr. Pearse: He doesn't tell us, Judge, what it is. If it doesn't say I object to what it is.

The Court: Get a translation of this German language expression.

Mr. Gechtman: May I translate it? That is "List of Persons who have Applied for Passports."

Mr. Stanziale: I would like to be allowed to ask the witness a question relating to that list.

The Court: Is that what that means, "A List of Persons who have applied for Passports"?

The Witness: The heading means that, yes.

Q. Can you tell us from what that list was made up?

A. Yes.

Q The answer is "Yes"?

A. Yes.

Q. All right. Now, what was that list made up from?

Mr. Pearse: May I first object unless she made it up herself, how does she know?

The Court: Did you make it up yourself?

[fol. 48] The Witness: I made part of it up.

The Court: The part that you made up was made up from what?

The Witness: From file cards.

The Court: File cards of what?

The Witness: That was kept in our office.

The Court: File cards of what?

The Witness: Of members and prospective members.

The Court: Of what?

The Witness: Of the Party.

The Court: Of which Party.

The Witness: Nationalist Socialist.

Q. Now, there appear on this list certain markings. Can you tell us which markings are in your handwriting. Would you care to take it out?

A. With the exception of a few they are all my handwriting.

Q. All your handwriting. Now, how is your handwriting indicated on the exhibit, in what way; by crosses, by writing and so forth?

A. By crosses and by writing and by stenography.

Q. Will you point on the exhibit where your handwriting is?

A. It is almost all over.

Q. Almost all over. Under what circumstances did you put your crosses and handwriting on that exhibit, how did it come about?

A. About the crosses I am not sure.

Q. All right. Your handwriting?

A. That came when the member returned to Germany, I would make a notation.

Q. When you say a member would return to Germany, you mean a member of the Nazi Party leaving the United States and going to Germany?

A. Yes, or prospective members.

[fol. 49] Q. Or prospective members. I see. Under what other circumstances did you mark that list?

A. When somebody ceased to be a member.

Q. Ceased to be a member; what would you do, if anything, with the list?

A. I would cross out the name and mark that he ceased to be a member.

The Court: How would they cease to be members?

The Witness: They declared their intention to become American citizens.

Q. When the member declared his intention of being an American citizen he ceased to be a member?

A. When he declared his intention.

Q. And you would cross out his name?

A. Yes.

Q. When you say you would cross out his name from the membership list, is that correct——

A. Yes.

Q. Under what other circumstances did you mark the exhibit?

A. I marked some sets of crosses pertaining to the Alien Registration.

Q. I see.

A. And some I marked pertaining to invitations.

Q. Now, will you give us your best recollection as to the marking of the crosses on the exhibit. What is your best recollection, the occasion for your marking crosses on the exhibit?

A. As I say, it pertained to the Alien Registration or to sending out invitations for festivity.

Q. Sending out invitations for festivities?

A. Yes.

Q. Did you send out invitations for festivities?

A. Yes.

Q. Under whose directions did you send out these invitations for festivities?

A. Mr. Vogel's.

Q. Now, would you send the invitations to the members of the Nazi Party?

A. To members and prospective members.

[fol. 50] Q. Now, where did you get the names of the members or the prospective members of the Party to send the invitations?

A. From the list.

Q. From what list?

A. From this list.

Q. From that particular list which is identified as Exhibit G-17 in evidence. Now, did you at any time——

The Court: Is it in evidence?

Mr. Pearse: No, not in evidence.

Mr. Stanziale: G-17 for identification.

Q. (Continuing) Did you at any time have any conversations with Dr. Draeger or with Hans Vogel in connection with that particular list?

• • • • • • •

Q. Did you have any conversation with Dr. Draeger or Hans Vogel in connection with this particular list at any time that you were there?

A. I might have.

Q. I see. Now, can you tell us in relation to what was the conversation in connection with the list?

A. I don't recall anything specifically now

Q. Was it in relation to the time that you got instructions to send out invitations?

A. I don't know.

Q. You don't remember. I see. Now, I believe you testified that the list was made up of the card index that you maintained at the office of the German Consulate; is that correct?

A. Yes.

Q. Now, Miss Illian, can you tell us what happened to the card index system that was maintained at the offices of the German Consulate at 17 Battery Place in New York?

A. It disappeared.

Q. It disappeared?

A. Yes.

Q. Can you tell us what happened to it?

A. As far as I know, it was destroyed.

[fol. 51] Q. Destroyed by whom?

A. I think Mr. Vogel.

Mr. Campbell: I object to what she thinks.

The Court: Do you know who destroyed it?

The Witness: No, I don't know positively.

The Court: But it did disappear from the office?

The Witness: Yes.

Q. Did you ever have a conversation with Mr. Vogel as to what happened to the card index?

A. Well, I heard him talk about it.

Q. All right; what did you hear Mr. Vogel state about the card index?

Mr. Pearse: May we have the approximate date, Mr. Stanziale?

Q. Can you tell us approximately when you heard this conversation?

The Court: First, did you hear Vogel say anything about the disposition of these records?

The Witness: Yes, I heard something about——

The Court: When?

The Witness: I don't know the exact date.

The Court: To the best of your recollection, just approximately to the best of your recollection.

The Witness: I think early in 1940.

The Court: Early in 1940?

The Witness: Yes.

The Court: Now, what was the conversation you heard?

The Witness: I heard something about destroying this record.

The Court: By whom?

The Witness: By Mr. Vogel.

[fol. 52] Q. Can you tell us in what manner, or was there any conversation by Mr. Vogel as to the method of destroying the index cards which bore the names of the Nazi members?

Mr. Gechtman: If she knows.

Mr. Stanziale: I am asking her.

The Court: If she doesn't know she is not going to testify I should imagine.

Mr. Gechtman: She has testified she didn't know what happened to them.

The Court: She is certainly not going to testify to something she doesn't know anything about.

(Question repeated by the reporter.)

The Court: Did Vogel say anything as to how these records were destroyed?

The Witness: Not these cards. I don't know how they were destroyed.

The Court: Well, did he say anything about the destruction of any records?

The Witness: Yes.

The Court: What did he say?

The Witness: Files that were kept.

The Court: And how did he say they were destroyed?

The Witness: They were burned.

Q. Can you tell us to whom he stated that the files had been burned?

A. I am sorry, I didn't quite get you.

Q. Did he state, did Mr. Vogel state or to whom——

The Court: You heard him say these files were burned, did you?

The Witness: Yes.

The Court: To whom did he say that?

[fol. 53] The Witness: He said it to us, to me.

The Court: To you?

The Witness: Yes.

Q. Was anyone else present?

A. Miss Koch might have been.

Q. Can you tell us, Miss Illian, to the best of your recollection, when that particular list, which is Exhibit G-17 for Identification, was made up from the card index bearing the names of the Nazi members?

A. I don't know the exact date.

Q. Your best recollection, approximately?

A. My best recollection is in the early part of 1940.

Q. In the early part of 1940?

A. Yes.

Q. I believe you testified that you worked on a part of this list. Can you tell us whether you saw Miss Koch also work on this particular list?

A. Yes, she started to write up——

Q. She started to?

A. Yes.

Q. Can you tell us to what she referred when she started to make this particular list?

A. To the file card.

Q. And did you refer to the file card also?

A. Yes.

Q. You completed the list?

A. Yes.

Q. Now, I believe you have further testified that the list was also used in obtaining the names of the members and the applicants and sending out invitations; is that correct?

A. Yes.

Q. Can you tell us how often invitations were sent out by the German Consul?

Mr. Pearse: Well, invitations to what, if the Court please?

Mr. Stanziale: She said festivities, your Honor.

The Court: Festivities?

The Witness: Yes.

[fol. 54] Mr. Stanziale: I am sorry, Mr. Pearse doesn't hear so well.

Mr. Pearse: Well, I don't. That's the trouble over here.

The Court: I didn't think anybody within 40 feet of this room could fail to hear Mr. Stanziale.

Mr. Pearse: Oh, I can hear Mr. Stanziale, I am talking about the young lady.

Mr. Stanziale: I will reframe the question for Mr. Pearse's benefit.

Q. You mentioned the fact that invitations were sent out; can you tell us invitations to what?

A. Invitations to festivities, from the German Consulate.

Q. Now, when you say festivities, what do you relate to, what kind of festivities? What were they, dances, motion pictures, lectures, what?

A. No.

The Court: Kaffee Klatch?

The Witness: No.

The Court: What?

The Witness: It is hard for me to find the translation right now.

The Court: Well, "Get Together." Call it a comprehensive term, it isn't important.

Mr. Stanziale: May I have these marked for identification separately.

(Certain papers are marked G-18 to G-35, inclusive, for Identification.)

Q. Were there festivities held in commemoration of German national holidays?

A. Yes.

Q. Were there any festivities in connection with the giving of lectures by different German speakers and the [fol. 55] German Consuls?

A. Well, I know that some Consuls spoke at these festivities.

Q. And there were also German dances, that is folk dances as part of the festivities?

A. That is one, yes.

Q. Where were the festivities held, what particular places?

A. New York Turn Hall.

Q. That is on 85th Street?

A. I think so.

Q. Yes. Where else?

A. Over in Brooklyn, in Schwaben Hall, I think.

Q. Were there any festivities in New Jersey?

A. Yes, the folk dances you refer to.

Q. Where?

A. At Schuetzen Park.

Q. At these particular affairs was Dr. Draeger there; would he go?

A. Yes.

Q. And did Hans Vogel go?

A. Yes.

Q. The members were invited to attend these particular functions?

A. Yes.

Q. And notice of these particular functions was given to the members by the list that you had?

Mr. Pearse: She said that twice already.

The Court: Try not to repeat, Mr. Stanziale.

Mr. Stanziale: He told me that he didn't hear so well, I wanted to make sure that he heard.

Q. Miss Illian, I refer to G-18 for Identification. Tell us if you recognize what that is?

A. Yes, this is one of the invitations.

Q. I show you Exhibit G-19——

Mr. Campbell: What was that?

(Answer repeated by the reporter.)

Q. (Continuing) Do you recognize G-19 for Identification?

A. It is also an invitation.

[fol. 56] Mr. Campbell: We cannot hear a word the witness is saying.

The Witness: That was also an invitation.

Q. Tell us if you recognize Exhibit G-20 for Identification?

A. It is also an invitation.

Q. Will you look at Exhibits G-21, G-22 and G-23 and tell us if you recognize those exhibits?

A. G-21 and G-22 are invitations for festivities; G-23 is an invitation for a boat trip.

Q. Will you look at Exhibits G-24, G24, G-25 and G-26 for Identification and tell us what they are?

Mr. Pearse: Judge, if she will identify them generally as being the kind of invitations that were sent out by the Consul we might save a lot of time instead of taking up each one of them.

Q. I will give them to her. Will you look at all these exhibits and tell us if they generally reflect the type of invitation that was sent out at the time that you were working at the office of the German Consul?

The Court: Were they the invitations sent out to various festivities by the Consulate?

The Witness: Not all of them; these two were asking the children to come to rehearsal or something.

The Court: Well, that is an invitation to have the children come to a rehearsal for a Christmas festival.

The Witness: The other is invitation for the names of children for a Christmas celebration.

Mr. Hayden: What are they numbered?

The Clerk: G-18 to G-35.

[fol. 57] Q. Miss Illian, I now direct your attention to the time that aliens were required to register under the Act of 1940, at or about the period either of August or September of 1940; can you tell us whether any of the members came to the German Consulate?

A. Yes.

Q. Can you tell us under what circumstances members of the Nazi Party came to the German Consulate?

A. They were requested to come.

Q. They were requested to come. Now, by whom were the members requested to come?

A. By Dr. Draeger.

Q. What method, if you can tell us, of communication was used?

A. A form letter was sent out.

Q. A form letter?

A. Yes.

Q. Did you send out any of these form letters?

A. Yes.

Q. Under whose direction did you send the form letters out?

A. Mr. Vogel.

Q. Mr. Vogel?

A. Yes.

Q. I see; and they were sent out to the members?

A. Members and prospective members.

Q. Prospective members also?

A. Yes.

Q. Can you tell us, in substance, what the form letters contained?

A. The form letters contained requests for those present to——

Mr. Pearse: Just a moment. Have you got one of those form letters? It speaks for itself, instead of having her recollection.

Mr. Stanziale: Mark this exhibit for identification.

(A paper is marked G-36 for Identification.)

Mr. Pearse: Is the translation there too?

Q. I show you an exhibit that is marked G-36 for Identification and ask you to look at it and tell us if you recognize [fol. 58] the exhibit, what it is?

A. Well, that is a form letter.

Q. Form letter to whom?

A. To a person whose name appears here, to come to the Consulate.

Q. I see. And that was sent out from the German Consulate?

A. Yes.

Q. Can you tell us whether—I am now referring to G-36 for Identification—this was the type of letter that was sent out to the members to come for Alien Registration?

Mr. Pearse: Now, wait a minute. I object to the form of that question, it has got too much in it.

The Court: Split it up, Mr. Stanziale.

Mr. Stanziale: Yes, your Honor.

Mr. Pearse: The letter speaks for itself, Judge, I don't think she needs to be asked any question. She identified it as a letter that was sent out.

The Court: Give me the letter.

Mr. Stanziale: Yes, your Honor.

The Court: Are these letters similar to those which were sent out?

The Witness: Well, the first part is.

The Court: The first part is?

The Witness: Yes.

The Court: How about that (indicating)?

The Witness: No, this states specifically why this person should come to the Consulate.

The Court: The first one is a notice to appear at the Consulate for the purpose of discussing a personal matter, is that right?

The Witness: Yes.

The Court: And then the second one contains in addition to that, information personal to the recipient?

The Witness: Yes.

[fol. 59] The Court: All right. And were letters similar to these sent out to the members whose names were contained on that list?

The Witness: Yes.

Mr. Pearse: Do you mean as to both, Judge, or only as to one?

The Court: Both.

Mr. Pearse: I don't think she understood the question then.

The Witness: No, just the form letter.

The Court: The form letter. Some of these forms were sent to some and others to others; is that right?

The Witness: No, I mean just the first part of the letter, that the person come to the Consulate, that is the form letter.

The Court: That is the form letter?

The Witness: Yes.

The Court: And the second part was a specific reference sent to individual members?

The Witness: Yes.

By Mr. Stanziale:

Q. Miss Illian, do you know whether any of the members came to the German Consulate after that form letter, which is Exhibit G-36 for Identification, was sent out?

A. Yes.

Q. Did they come in response to that?

A. Some of them, yes.

Q. Can you tell us whether any of the persons that appeared spoke either to Dr. Draeger or Hans Vogel?

A. Yes, they were instructed by Dr. Draeger.

Q. They were instructed by Dr. Draeger?

A. Yes, or by Mr. Vogel.

[fol. 60] Q. I see. Can you tell us what instructions, if any, were given either by Dr. Draeger or Hans Vogel to the first person that came——

Mr. Pearse: Well——

Q. (Continuing:)—to the Consulate office—Wait a minute, Mr. Pearse—to the Consulate office in response to the letter that you sent out?

The Court: Don't answer that. Are you going to prove, Mr. Stanziale, that some of these defendants responded, because I don't want just generalities?

Mr. Stanziale: Yes, your Honor, I am going to prove some of these defendants came.

The Court: All right.

Mr. Pearse: And that you saw them and heard what was said?

Mr. Stanziale: No, your Honor please, that is not what your Honor asked me.

The Court: No, but Mr. Pearse is asking you a question which may have some effect on the admissibility of this evidence.

Mr. Stanziale: I don't know whether any of these defendants were there at this particular time, but I will show a course of conduct by admissions made by those defendants themselves that they appeared at the Consulate office in response to letters received.

The Court: The question is did they appear at the time Dr. Draeger made the comment.

Q. Can you tell us, Miss Illian, whether instructions were given to those members that appeared?

A. Yes.

Q. There were.

[fol. 61] Mr. Stanziale: Mark this exhibit for identification.

(A paper is marked G-37 for Identification.)

Q. Miss Illian, I show you exhibit marked G-37 for Identification; I ask you if you recognize the exhibit?

A. Yes.

Q. What is Exhibit G-37 for Identification?

A. That is a wording of an answer of two of the questions in Alien Registration questionnaire.

Q. Which referred to Questions 10 and 15?

A. Yes.

Q. Now, can you tell us whether you received either the exhibit itself or a similar exhibit from anyone at the German Consulate office?

A. I received the wording was dictated to me.

Q. All right; the wording was dictated to you?

The Court: Now, I think in accordance with the plan I have outlined, we will take a five-minute recess.

Mr. Stanziale: Thank you.

The Court: You need be only incidentally grateful, because it is mainly for the jury. All right.

(A short recess was taken.)

By Mr. Stanziale:

Q. Who dictated G-37 for Identification or a likeness of it to you?

A. Mr. Vogel.

Q. Now, what, if anything, was said to you by Mr. Vogel at the time the contents of Exhibit G-37 for Identification were dictated to you?

A. Well, if anybody—any of the members came into the office when Mr. Vogel was out I was to give this person this wording how to fill out the Alien Registration blank.

[fo. 62] Mr. Pearse: It may be quite important, Judge, and we didn't hear it.

The Court: I think, Mr. Stanziale, if you will stand further away there won't be the temptation to murmur in your ear.

Mr. Stanziale: Very well, sir.

Q. Now, did you type such slips up, Miss Illian?

A. Yes.

Q. And in pursuance to the instructions that you got from Mr. Vogel, did you hand out any of those slips to the members that called at the office of the German Consulate?

Mr. Azzoli: When was this? We have no date.

The Court: Set the time, approximately.

Q. Can you tell us approximately when the contents of Exhibit G-37 for Identification was dictated to you by Mr. Vogel?

A. I cannot tell you the exact date.

Q. I understand that. Your best recollection.
A. During the time of the Alien Registration.
Q. During the time of the Alien Registration?
A. Yes.
Q. All right. Now you can tell us whether you handed out such slips to any of the members that called at the office of the German Consulate?
A. I think I did.
Q. All right.

Mr. Stanziale: Will you mark this exhibit for identification, please.

(A paper is marked G-38 for Identification.)

Q. Miss Illian, I show you an exhibit that is marked G-38 for Identification and ask you if you recognize that exhibit?
A. Yes.
[fol. 63] Q. What is Exhibit G-38 for Identification?
A. It is the list of names that I have made up.
Q. Made up under what circumstances; what was the occasion of you making the list up?
A. These people had registered before they got the second instruction as how to register.
Q. The second instructions, you say?
A. Yes.
Q. Can you tell us what the first instructions were?
A. Yes.
Q. What was it?

Mr. Pearse: I thought you said you had it in writing here.
Mr. Stanziale: I didn't say anything of the kind.
Mr. Pearse: If the Court please, Mr. Stanziale identified an exhibit of the last one before this one, in which he asked her the question as to whether or not certain wording was contained in there and her answer was "Yes." Now she——

The Court: Are you referring to the same thing, Mr. Stanziale?

Mr. Stanziale: No, your Honor. She said there were two sets of instructions. I would like to find out whether the exhibit was the second or the first.
The Court: Have you two sets?

Mr. Stanziale. I have only one.

The Court: In addition to this one was there another set of instructions?

The Witness: Yes, but not in writing.

Q. The instructions that were not in writing, Miss Illian, were they the first or the second instructions?

A. They were the first.

The Court: And given by whom?

The Witness: By Dr. Draeger.

[fol. 64] Q. Will you tell us what the instructions were by Dr. Draeger, the first instructions.

A. Yes, the instructions were——

Mr. Pearse: Well, if the Court please, I object to any conversation between her and Dr. Draeger. I understood her to say that they were not in writing.

The Court: Not in writing but they are the declarations of a co-conspirator which will be admissible against all conspirators if conspiracy be proven and the participation of these defendants be shown.

Mr. Pearse: Thank you, sir.

The Court: Just go ahead and say what the instructions were.

A. (Continuing:) He instructed the members and prospective members not to put the fact in that they were members of the National Socialist Party.

The Court: Not to put the fact in what?

The Witness: In the question, not to refer to them at all.

The Court: In the Registration questionnaire?

The Witness: Yes.

Mr. Gechtman: Pardon me; did I hear the witness say that he told them that it didn't refer to them at all?

Mr. Stanziale: I object to that.

The Court: He said not to put it in, not that it did not refer to them.

Q. And the exhibit that you testified to, as to G-37 for Identification, that was the second set of instructions that you received; is that correct?

A. Yes.

[fol. 65] Q. Can you tell us who asked you to prepare the list of members that had registered before receiving

information from the German Consulate, which is the subject-matter of G-38 for Identification?

A. I think those people had registered before they got the second instructions.

Q. The second instructions?

A. Yes.

Q. Can you tell us whether there was any conversation as to what the persons whose names appeared on G-38 for Identification had answered their questionnaire?

The Court: That is involved, Mr. Stanziale.

Q. Can you tell us how——

Mr. Stanziale: I withdraw that.

Q. Can you tell us if there was any conversation with Dr. Draeger or Mr. Vogel as to why this particular list, which is G-38, was to be prepared?

A. Yes.

Q. Tell us.

The Court: What was that conversation?

The Witness: These people were to get a letter that was sent to the State Department an amending letter,—I think they said something about it this morning.

The Court: They were to get a letter?

The Witness: Yes.

The Court: Which they in turn were to send to the State Department?

The Witness: Yes.

The Court: And the letter was to be sent out by whom, sent out from the Consulate?

The Witness: Yes, it was given to the person I think.

[fol. 66] The Court: Given to them?

The Witness: I would never send it out I know; it was somehow given to this person and he sent it to the State Department.

Q. Now, you mentioned the word "to amend"—to amend what, Miss Illian?

A. To amend that they—to the second instruction that they were non-resident members and so on.

Q. Do I understand you correctly that they were to send to the State Department amending the original Alien form that they had sent; is that correct?

• • • • • • •

Q. What was to be amended, Miss Illian?
A. Those two questions to be amended in the form.

The Court: The answers to the two questions were to be amended in the form suggested by the information given from the Consulate; is that it?
The Witness: Yes.

Q. And was that that, "I am a non-resident member of the National Socialist Party?"
A. Yes.

Q. Can you tell us where you got the list of names as appeared in Exhibit G-38 for Identification?
A. I think that was told to me by Mr. Vogel.
Q. They were given to you by Mr. Vogel?
A. Told to me.

The Court: "Told" to me.

Q. All right.

Mr. Stanziale: Would you mark this exhibit.

(A paper is marked G-39 for Identification.)

[fol. 67] Q. I show you Exhibit G-39 for Identification and ask if you recognize that exhibit?
A. Yes; this is the letter I referred to that was sent to the State Department.
Q. Amending the original Alien form?
A. Yes.

Mr. Stanziale: Mark this exhibit for Identification, please.

(A paper is marked Exhibit G-40 for Identification.)

Q. Miss Illian, refer back to the list of members that you have testified to as members of the Nazi Party. Can you tell us where you obtained the addresses of these members in order to send out the invitations or notifications?
A. We kept Addressograph stencils in the file in the file cabinet.

Q. I show you an exhibit that is marked G-40 for Identification and ask you whether G-40 for Identification was the emblem that was given, if any, to the members of the Nazi Party?

The Court: Let's see. Is this supposed to have been issued at the Consulate and given to members?

The Witness: It was sold.

The Court: It was sold at the Consulate.

The Witness: Yes.

The Court: To men on the list that you have spoken of?

The Witness: Yes.

The Court: How much was it?

The Witness: Fifty cents.

The Court: Fifty cents?

The Witness Yes; I'm quite sure.

[fol. 68] The Court: Well, in any event, that emblem was available for purchase at the Consulate to any of the members on the list which you spoke of, as having helped in the preparation of it, this morning; is that right?

The Witness: Yes.

* * * * * * *

Mr. Stanziale: Mark this for identification.)

(A paper is marked G-41 for Identification.)

Q. Now, can you tell us, Miss Illian, again referring to Exhibit G-40 for Identification, up to what period emblems, such as reflected in G-40, were available at the office of the German Consulate?

A. I don't know.

Q. You cannot tell us approximately when, your best recollection, what year they were available?

A. Yes; they were available at the office of the German Consulate.

The Court: Were they on sale there?

The Witness: Yes, they were on sale before I left, I left before they closed.

The Court: When did you leave?

The Witness: I left in May.

Q. What year?

A. 1941.

The Court: Until that time these were available?

The Witness: I think so, I am not quite sure.

The Court: But they were available before that, were they?

The Witness: Yes.

Q. I call your attention to Exhibit G-41 for Identification; tell us if you recognize that exhibit?

A. Yes.

[fol. 69] Q. What is that G-41 for Identification?

A. This is a receipt of prospective member paid for dues.

Mr. Pearse: Would you mind having that repeated?

(Answer repeated by the reporter.)

Q. Is the exhibit that you have before you broken down as to particular amounts that were paid?

A. Yes, it is broken down as to the amount I stated earlier.

Q. I call your attention to Exhibit G-10 for Identification, which is the Nazi membership book that was given, as you testified to the members. Can you tell us if the signature that appears therein is the signature of Dr. Friedhelm Draeger?

A. It looks like Dr. Draeger's signature.

Q. Can you tell us at the time that the books were received of the members from Germany at the German Consulate, whether Dr. Draeger endorsed his signature in the membership books that were given to the members of the Association?

Mr. Pearse: I object to the form of that question, there is something about "from Germany." May we have that repeated? I didn't understand that, it was quite involved.

The Court: Let's just solve that this way. Did Dr. Draeger sign the membership books?

The Witness: He did.

Mr. Stanziale: I think there was testimony, your Honor please, that the books came from Germany.

The Court: Then why repeat?

Mr. Stanziale: May I have a moment, your Honor?

The Court: Yes.

[fol. 70] Q. Miss Illian, did you ever receive any moneys from either Dr. Draeger or Hans Vogel in connection with Party membership dues?

Mr. Pearse: What?

Mr. Jackson: Membership dues.

Mr. Pearse: How would that be material here?

The Court: What is the purpose of that question?

Mr. Stanziale: I want to show, if your Honor please, that they also collected dues and gave it to her in which she deposited this money to the account of the German Consulate, to show it was banked here.

The Court: She says as far as she was concerned, so far, that the moneys she received she put in the cash account.

Mr. Stanziale: I want to show there was an account opened here also.

The Court: Where?

Mr. Stanziale: In the Marine Bank.

The Court: In New York?

The Witness: In New York, yes.

The Court: Did you make a deposit of the funds received for these membership dues?

The Witness: Yes. I did.

The Court: Where?

The Witness: In the Marine Midland.

The Court: The Marine Midland Bank?

The Witness: Yes.

Q. Can you tell us whose name the account was in the Marine Bank?

Mr. Pearse: Well, now, I object to that; that would be [fol 71] something she would be stating from memory and it must be perfectly easy for the Government to find out accurately.

The Court: Well, there may be several accounts there.

Let me ask this question: In what account did you deposit that money?

The Witness: The German Consulate.

The Court: German Consulate general account?

The Witness: Well, I remember that the name on the deposit book was German Consulate.

The Court: German Consulate.

Mr. Stanziale: I have no further questions, your Honor; at this time I would like to offer in evidence the exhibits that have been testified to.

Mr. Pearse: Well——

Mr. Stanziale: Just a moment, Mr. Pearse, if you don't mind.

Mr. Pearse: I thought you were through. Pardon me. Pardon me.

Mr. Stanziale: May I be permitted, sir——

The Court: Are you calm?

Mr. Stanziale: Yes, I am very calm. I try to be patient with Mr. Pearse. I would like to offer formally for the record the exhibits that have been identified by the witness Miss Illian, in evidence, Exhibits G-2——

The Court: Well, let's see. Are there any objections to them?

Mr. Pearse: Oh, yes, Judge, we have got to look at them first and he is making the offer now and I would like to have us have an opportunity between now and tomorrow morning to look them over.

The Court: Mr. Stanziale, let it be understood that you [fol. 72] offer in evidence now all of the exhibits which heretofore have been marked for identification and which have not hitherto been received in evidence.

Mr. Stanziale: That's right.

The Court: Then that offer will stand and counsel will have the opportunity between now and tomorrow morning to examine them so that they may know which of them they desire to raise objection to.

Mr. Pearse: And for the few minutes before we close do you want us to take up the cross-examination of this young lady—I am wondering whether she is tired or not?

The Court: I think it would be better to take the time in making this examination. You will be excused until tomorrow morning for cross-examination.

Mr. Stanziale: Your Honor, may I make this suggestion. With the exhibits are the translations in English, I have the translator here. I was wondering if we could save some time if we call the translator and qualify him.

The Court: Let them look them over and see if at the same time they will agree on the translations.

Mr. Pearse: He is going to say he is a good translator and we are going to take his word for it, but we are going to ask leave of the Court to have one of the defendants who understands German look them over.

The Court: All right, Miss Illian, you will be excused; I don't think there is any need of holding you any further, ladies and gentlemen of the jury, so you will be excused too until tomorrow morning at 10 o'clock. Remember my

[fol. 73] usual injunction, don't discuss this case with anyone and don't permit anyone to discuss it with you.

(Adjourned to Wednesday, November 29, 1944, at 10 A. M.)

Newark, New Jersey,
Wednesday, Nov. 29, 1944

[Case Continued.]

(Appearances as before.)

The Court: All right, you may proceed.

* * * * * * *

Lilly Illian resumed the stand.

Mr. Pearse: May I proceed, sir?
The Court: Yes, surely.

Cross examination.

By Mr. Pearse:

Q. Miss Illian, you told us yesterday that you were employed at the German Consul's office in New York; when did you start that employment?

A. In March 13, 1939.

Q. And how long had you been in this country?

A I came to this country in 1936.

Q. Then in 1939 you got this job there at the Consul's office as what?

A. As stenographer.

Q. As a stenographer. Now, Dr. Draeger was the German Consul, was he?

A. Yes.

Q. Was he Consul General or was he just Consul?

A. His title was Consul and Kreisleiter.

[fol. 74] Q. Now, won't you please speak up so that all of these gentleman across there can hear what you say? What did you say?

A. As far as I know, his title was Consul and Kreisleiter.

Q. Not Consul General?

A. No.

Q. He was the head of the office there in New York?
A. Which office do you mean?
Q. The Consul's office.
A. As far as I know, the head of the Consul- was the Consul General.
Q. Oh. And was the Consul General in that office too?
A. No.
Q. Where was he?
A. Oh, he was in 17 Battery Place.
Q. 17 Battery Place?
A. Yes.
Q. So that at 17 Battery Place the Consul General was also located as well as Dr. Draeger, who was the Consul?
A. Yes.
Q. Is that right?
A. Yes.
Q. And how many departments or divisions were there in that office?
A. I couldn't say the exact amount of—the exact number of divisions. There were several though.
Q. Several. Do you know the names of some of the divisions?

The Court: What is the purpose of that, Mr. Pearse?
Mr. Pearse: Because of a list which the Government is attempting to introduce.

Q. Was there a Passport Division?
A. Yes.
Q. Now, who else was in the office with you?
A. Mr. Vogel and Miss Koch.
Q. Mr. Vogel and——
A. And Miss Koch.
Q. And I understood you to say that Mr. Vogel was Dr. Draeger's secretary?
A. Yes.
Q. Or assistant?
A. He was the Consul's secretary; I don't know about assistant.
[fol. 75] Q. The Consul's secretary. And what was the task that Miss Koch had to perform?
A. The same that I did.
Q. Which was a stenographer and——
A. Typist.

Q. Typewriter. Were you a stenographer too?

A. Yes.

Q. How much experience had you had when you went to the office?

Mr. Stanziale: I object as immaterial.

The Court: How long, what experience had you had as a stenographer?

The Witness: I don't know what the gentleman refers to.

The Court: How long had you been a stenographer before you went there?

The Witness: I had been a stenographer in Germany.

The Court: For how long?

The Witness: About three years.

Q. You came to this country in 1936 though?

A. Yes.

Q. And did you work at stenography from the time you came here?

A. No, not all the time.

Q. But you had had some experience?

A. Yes.

Q. Now, you identified certain exhibits yesterday, Miss Illian, with respect to membership and you say that German Nationals came from time to time to the office to make application for membership in what is called, in brief terms, the Nazi Party; is that right?

A. Yes.

Q. Now, then, will you pick out for us the first paper that anyone who applied for membership had to fill out?

A. The person himself?

Q. Yes.

A. The person himself filled out—there were more——

[fol. 76] Q. Pick out the first paper that was signed that was filled out by the applicant.

A. He got the papers in a bunch.

Q. Will you pick out the bunch then?

A. These four (presenting papers).

Mr. Stanziale: Shall we have them mentioned?

Mr. Pearse: I will mention them in a minute, Mr. Stanziale. And witness refers to G-2 for Identification, G-3, G-5 and 6.

Q. Now, then, this G-3 was filled out at your office, or was it brought in filled out?

A. It was brought in filled out.

Q. Brought in. Where could the blanks be secured?

A. We had them at the office.

Q. You had them at the office?

A. Yes.

Q. Then I understand at the same time G-2 was brought in; is that right?

A. Yes.

Q. And G-5 and G-6?

A. Yes.

Q. Now, then, show us where on these exhibits that I have shown you is the space for the American sponsors and the German sponsors that you told us about yesterday.

A. That is on this paper (indicating).

Q. That is referring to G-4. When is this filed?

A. This was filled out at our office when the person came in to apply for membership and before he received the other forms.

Q. And before he received the other forms. So then the first step that a person was called upon to take in order to become a member of the Party was filling out and signing G-4?

A. He did not sign it, we filled it out.

Q. He did not sign it; I see. And it says down here at the bottom, speaking in English, "I hereby affirm that my above statements are the full truth and complete truth," and there is room for signature. Whose signature is that? [fol. 77] A. I don't know. As far as I know, he never signed this particular paper.

Q. As far as you know, no one was ever called upon to sign the piece of paper G-4?

A. No.

Q. Now, is that the paper that speaks of sponsors?

A. Yes.

Q. Now, will you just show us on G-4, point out where it speaks of sponsors?

A. Reference in Germany and reference in the United States.

Q. Oh, I see. Reference in Germany, two; references in the United States, two?

A. One and two.

Q. Now, then, after these papers were filled out, I assume that they were left in the office. Then what was the next step that was taken by anyone?

A. After they were completely filled out some of them were sent over to Germany with other reports from Dr. Draeger.

Q. Some of them were sent over to Germany, you mean some of the papers?

A. Yes, two of them.

Q. Which papers were sent over to Germany?

The Court: Haven't we been all through that?

Mr. Pearse: Well, Judge, we didn't see them yesterday.

The Court: Well, I saw them and you had an opportunity to see them. She said which was sent to Germany, which were signed here, which were kept in the files. We don't have to go all through that again. I will ask counsel to pay strict attention and not waste my time or the time of the jury.

Q. G-2 and G-3 were sent to Germany, is that right?

A. Yes.

Q. Now, will you pick out the next paper?

The Court: Now, all counsel are getting this I hope, because I will not permit this to be gone over again.

[fol. 78] Q. Pick out the next paper in the order of securing membership.

A. The next paper isn't here.

Q. Now, what is the next paper then?

A. The person who was a prospective member received a Parteianwaerter card which was issued in New York.

Q. Is there a sample of that here?

A. No.

Q. Translated what does that mean?

A. Prospective member card.

Q. Prospective member?

A. Yes.

Q. Then what happened next?

A. The person retained that card for about a year or longer until his membership card came from Germany.

Q. And until he received the membership card from Germany he was only a prospective member, was he?

A. Yes.

Q. In other words, only an applicant?

A. Yes.

Q. To become a member of the Party, and then the card which was received from Germany is which exhibit—that is the pink card?

A. It came in this folder most of the time.

Q. Came in the folder G-7, and what is G-8?

A. That is — membership card.

Q. That is the card which comes in this folder?

A. Yes.

Q. The two go together?

A. Yes.

Q. And this card indicates that the person whose name is on there has been accepted as a member of the Party?

A. Yes.

Q. Is that right? And then after that was there any other card issued?

A. He kept this card for about two years I think.

Q. That is number 8?

A. This was sent to Germany and instead of that card, if the book wasn't there already at the Consulate, he was issued this green card.

Q. And Card 8 then was sent to Germany, the pink card was sent to Germany and then what happened you say?

[fol. 79] A. If the book wasn't already at the Consulate this person got the green card.

Q. I see. In other words he got a temporary card?

A. Yes.

Q. Of membership?

A. Yes.

Q. But until he either got the pink card or the green card, he was not a member of the Party?

A. He was not a full member.

Q. What do you mean by a full member?

A. He was a prospective member.

Q. He was a prospective member?

A. Yes.

Q. He hadn't been accepted yet?

A. No.

Q. Is that right? And the book here, Exhibit No. 10, that ultimately arrived in the possession of one who was accepted as a full member, is that right?

A. Yes—it also came in the gray envelope.

Q. It also came in the gray envelope, which is marked G-7?

A. Yes.

Q. Now, then, these stamps that you speak of which were given when a man paid his dues, those are the same stamps that are attached in the book, are they not, Exhibit G-10?

A. Yes.

Q. These are the stamps you are talking about?

A. Yes.

Q. That is in the nature of a receipt, I suppose?

A. Yes.

Q. Now, when a man made an application to become a member he started paying dues, didn't he?

A. Yes.

Q. That was a requirement?

A. Yes.

Q. Did he pay any dues while he was a prospective member?

A. Yes, he paid dues as soon as he brought in the papers.

Q. He had to start paying dues whether he was to be ultimately accepted or not, is that right?

A. Yes.

Q. You say that you had something to do with the collection of the dues?

A. Yes.

[fol. 80] Q. And as I understood you to say yesterday, the dues that were paid in at the office to anyone there at the office who accepted them, the person got either a receipt or a stamp?

A. Yes.

—. Now, of course, the person who was not yet a member got the receipt, isn't that right?

A. And the stamp.

Q. And the stamp?

A. Either receipt or stamp. The receipts are given out when the stamps weren't there.

Q. Well, what was the man who was only an applicant supposed to do with that stamp?

A. Put them in his Parteianwaerter card.

Q. In what?

A. In his prospective member card. They were also——

Q. Oh. Put it on the prospective member card?

A. Yes.

Q. And you say that the receipts were only given when there were no stamps?

A. Yes.

Q. Now, then, I call your attention to G-17 for Identification, which is a list of names; will you just translate that again what appears on the top of the list?

Mr. Stanziale: I object to that, if your Honor please, because I don't think——

The Court: Is there a translation on it?

Mr. Stanziale: I don't think the translation means anything or what it is listed under. She testified that it was a list of members of the Nazi Party and applicants to the Party.

Mr. Pearse: I have a perfect right to cross-examine her.

Mr. Stanziale: And whether it is designated as something else makes no difference.

The Court: We translated it once before, yesterday. Now, Mr. Pearse, I don't want to seem to be limiting you too much, [fol. 81] but please do not ask these things to be repeated endlessly. Tell us just without being held strictly to any attempted exact translation, tell us what you think that means in English.

The Witness: This just means a person who has applied for passport.

Q. Yes. What else?

A. See single files in the Passport Division.

Q. See single files in the Passport Division?

A. Yes.

Q. And is that speaking of the Passport Division in your office?

A. No.

Q. What office?

A. Passport office.

Q. Well, it is part of the Consul's office though, isn't it?

A. Yes.

Q. Did you say that you made up this list?

A. I made part of it up.

Q. Point out again the part that you made.

A. I made out the last pages.

Q. The last how many pages?

A. I don't know for sure, but I think the last three pages.

Q. The last three pages?

A. Yes.

Q. And I understood you to say that you got the names which you put on these pages from a card index in your office?

A. Yes.

Q. And that was the card index, was it not?

A. Yes.

Q. Of persons who had applied to become members of the Party, as well as persons who had become full members?

A. Yes.

Q. In other words, as soon as an application was made a card in your card index was put in?

A. Yes.

The Court: And they immediately started paying dues?

The Witness: Yes.

[fol. 82] Q. And so the list of names here includes all of those people?

A. Yes.

Q. Is that right?

A. Yes.

Q. That was in that card index. I understood you to say that you made up this list, or part of it, in the early part of 1940, was it?

A. I think it was.

Q. You think it was. And did you see Miss Koch working on the rest of the list?

A. She started the list.

Q. How long before you started to work on it?

A. Well, I don't know how long—a few days.

Q. Only a few days. So that this list was all—the complete list, Exhibit G-17, was all compiled within a few days; is that right?

A. Yes.

Q. And she took the names, did she, from the card index?

A. Yes.

Q. The same way you did?

A. Yes.

Q. Now, as a matter of fact, was it not true that a number of German Nationals living in New York paid dues without making any application to become a member of the Party?

A. Not that I know of.

Q. Not that you know of. And you don't know whether any such persons were down in that card index of yours?

A. No.

Q. Sorry to repeat, but that first application that was made, was that filed in your office?

A. The one that was filled out in our office was retained there, yes.

Q. Your office was closed in the early sumer of 1941, was it not?

A. I think it was closed after I left; I left in May.

Q. I beg your pardon?

A. I left in May. It was closed after.

Q. And you say that you had a talk with Mr. Vogel with reference to a fire, is that right?

A. No.

Q. Or the burning of papers?

A. The destroying of papers, yes.

[fol. 83] Q. And when did that conversation take place?

A. I don't know when.

Q. Well, was it in 1940 or '41, or when was it?

A. I think it was in 1940 when this list was made up.

Q. You think it was?

A. Yes, I don't know the exact date; I'm sorry.

Q. Well, just what did Mr. Vogel tell you?

A. He told that the file cards are going to be destroyed.

Q. The what?

A. The file cards are going to be destroyed.

Q. The file cards are going to be destroyed?

A. Yes.

Q. And, so far as you know, they were destroyed?

A. Yes

Q. You didn't see them after that?

A. No.

Q. Was that shortly after you made up this list?

A. They disappeared shortly after this.

Q. What?

A. They disappeared shortly after this.

Q. Now, then, I understood you to say yesterday that after the Act of 1940 was passed, which required all aliens to register, that some of the aliens came to your office, some of the German aliens came to your office to get instructions.

A. They were called to the office.

Q. They were called?

A. Yes.

Q. And did you point out in these exhibits what that call was?

A. I testified before that they received a form letter requesting them to come to the Consulate.

Q. Say that again, will you?

A. I pointed out before that they received a form letter requesting them to come to the Consulate.

Q. Yes. I am just trying to find out——

Mr. Pearse: Has this been opened?

Mr. Stanziale: You can open it. It has a number on there.

Mr. Pearse: Yes.

[fol. 84] Q. Now, I show you a part of G-36 for Identification and ask you if that is the form letter that you speak of?

A. This is the translation.

Mr. Stanziale: Would you mind keeping the two numbers together there, please?

Q. Which is the one that you speak of?

A. This one (indicating).

Q. Now, is there any difference in the nature of the one that you speak of as "this one" and the other one which is under this same exhibit number?

A. Yes.

Q. Now, what is the difference?

A. The difference of this letter is that it states in reference to what he should come to the Consulate.

Q. And what he should come to the Consulate for is in connection with the fact that he hadn't paid his dues and he was being called in; is that right?

A. That's right.

Q. And is the language up here of the other letter addressed to the same person any different from the language of the one that you speak of, which is in reference to his dues?

A. No, there is no difference.

Q. Just the same, isn't it?

A. Yes.

Q. So it is an invitation to come to the Consul's office?

A. Yes.

Q. On a personal matter?

A. Yes.

Q. Have you any idea how many people responded to this notice that was sent out?

A. No, I don't — how many.

Q. Did you send out the notices?

A. I sent them out, yes.

Q. Were you told what the notices were for?

A. Yes.

Q. Who told you?

A. Mr. Vogel.

Q. What did he tell you?

A. He told me to write letters, form letters requesting 10 or 15 persons at a time to come to the Consulate in order to get their instructions for the Alien Registration.

[fol. 85] Q. Now, did he give you any instructions as to what to say to anyone who came?

A. Yes.

Q. What did he tell you to say?

A. He dictated form of— He dictated how to fill out a certain question there; I pointed it out yesterday.

Q. Well, that was the second, wasn't it, not the first?

A. Yes.

Q. Well, did this exhibit— Was this Exhibit G-36, was that sent out first?

A. I am sorry, I don't understand you.

Q. You said there were two times that these people were sent for to come to the office; is that right?

A. Yes, and each time they received a letter like that.

Q. Now, to whom was the letter sent?

A. Sent, the form letter, about 10 or 15 people alphabetically on this list.

The Court: At a time?

Q. At a time?

The Witness: At a time.

Q. And then did you keep a list of those who came in?

A. No.

Q. You didn't?

A. No, I crossed them off on the list.

Q. Crossed them off on the list. And then you say that when these people came in Mr. Vogel told you what to say to them?

A. No, only in one instance.

Q. Only in one instance?

A. Yes.

Q. Did you give any of these people that came in advice as to how to fill out this Government questionnaire?

A. I might have, yes.

The Court: Did you give them the form that Vogel dictated?

[fol. 86] The Witness: Yes, I might have given it, yes.

The Court: Well, what do you mean you "might have"? Did you or did you not?

The Witness: I think I did.

Q. Well, the form which you speak of which is in Exhibit G-37, is that right?

A. Yes.

Q. And after the first notice was sent out, that was the form that was prepared by Vogel; right?

A. No, that was after the second instructions came out. The first instructions were that they were not requested to put anything down pertaining to the Party. Those were the first instructions.

Q. Now, Vogel, told you that?

A. Yes.

Q. Is that right?

A. Yes.

Q. And you say that you instructed one person——

A. I didn't say I instructed one person, I might have instructed more.

Q. You did?

A. I might have I think.

Q. You might have. You don't remember?

A. I don't know.

The Court: Well, when people came in whom did they see?

The Witness: Mr. Vogel or Dr. Draeger. They were instructed by Dr. Draeger when they came in a bunch you see, but some came during the day mostly, they were instructed by Mr. Vogel. When Mr. Vogel was out I might have given them the same instructions.

The Court: But generally, the instructions were given by Dr. Draeger?

The Witness: Yes, or Mr. Vogel.

The Court: Or both?

The Witness: Yes.

[fol. 87] Q. But you didn't hear the instructions that Dr. Draeger gave?

A. No.

Q. Nor did you hear the instructions that Vogel gave, did you?

A. I heard them, yes.

The Court: Now may I proceed?

Mr. Pearse: Pardon me, sir.

The Court: Did either Vogel or Draeger ever tell you what the instructions were that they gave to these men?

The Witness: Yes, I heard Mr. Vogel's instructions too, because when Dr. Draeger wasn't there Mr. Vogel would give them, and that was in the same office that I was in.

The Court: But you never heard Draeger's instructions?

The Witness: No.

The Court: Did Vogel or Draeger ever tell you what instructions Draeger gave?

The Witness: Yes, it was supposed to be the same instructions.

Q. And you say that you recall those instructions to be that they were not to say anything in the questionnaire about being members of the National Socialist Party of Germany, is that right?

A. The first instructions.

Q. Now, isn't it a fact that Vogel or you or Miss Koch told a number of these people when they came in that it didn't make any difference how they answered the questions?

Mr. Stanziale: I object to that.

The Court: I will allow it. Is it a fact that you told them that it didn't make any difference how they answered the questions?

[fol. 88] The Witness: I didn't tell anyone such a thing, and I don't know if anybody else told that.

Q. Now, then, after these verbal instructions that you told us about and that you say were given to these people that came in, you say another letter like the one that we have been talking about, to come in and see the Consul about a personal matter, was sent out?

A. Yes.

Q. Now, to whom was that sent out?

A. Also to the members.

Q. What?

A. Also to the members and prospective members as they appeared on the list.

Q. A complete list was sent out, I mean you sent them out to everybody on the list?

A. Yes, 10 or 15 at a time.

Q. Well, you mean you sent this second letter to people that had not already come in and received instructions?

A. Yes.

Q. You did. And that is the letter which is marked, or those instructions are— Have you got those instructions here?

A. Yes.

Q. Those are the instructions that appear in G-37, right?

A. The second instructions.

Q. The second instructions, yes. Now, these second instructions which were given were those instructions also given to those who had not yet been accepted as members of the Party?

A. No.

Q. Those instructions were only given to persons who had been accepted as members?

A. Yes.

Q. Right. And the first instructions that you speak of that were given, were those the instructions that were given to those who were only applicants for membership?

A. No, the first instructions were given to members and prospective members.

Q. In other words, you say that the same instructions, so far as you understand it, were given to both those who were not members and those who were members?

A. Yes.

[fol. 89] Q. Is that right?

A. Yes.

Q. Now, you said a few moments ago that you knew of no people who came to the Consul's office who were not members of the Party but who paid dues.

A. No.

Q. Do you know Mr. Hansen? Will you stand up, Mr. Hansen, please?

A. He looks familiar, but I don't know.

Q. What was the answer.

The Court: He looks familiar, but I don't know him.

Q. You don't recall having seen him there paying dues?
A. No.
Q. And you don't remember what was noted on his name so far as your card index was concerned?
A. No.

The Court: Is it the contention that this man's name was on the card index?

Mr. Pearse: Well, she says this list was made from the card index and his name appears on this list.

The Court: Card index of prospective and actual members.

Mr. Pearse: Yes.

Q. Do you know Mr. Fiswick?
A. No.
Q. You don't. You don't know whether he was a prospective member or a fullfledged member?
A. No, I couldn't say that without looking at the list.

The Court: What significance has that as far as receiving the instructions is concerned?

Mr. Pearse: If the Court please, the reason I asked the question is this. It seems to me there is a great distinction, so far as this questionnaire which was required to be filed by the United States Government——

[fol. 90] The Court: No, I am simply saying now she has testified that both prospective members and members paid the dues, and your question is directed to Fiswick and Hansen, immediately following, did she know of any people who were not either members or prospective members who paid dues. Now, is it your contention that Hansen and Fiswick were not either prospective or actual members?

Mr. Pearse: My contention is that Fiswick was a prospective member, he never became a member of the Party, and that Hansen never made an application but was required to pay dues.

The Court: Although his name is on the list.

Mr. Pearse: His name is on this list.

Q. You spoke yesterday of festivities. I show you this batch of exhibits starting with G-18, and you spoke of them also, I think, or Mr. Stanziale did, as invitations.
A. Yes.
Q. As a matter of fact, those were notices which were sent out by the Consul's office of various lectures and enter-

tainments and social affairs in German organizations in and about New York that were being conducted, isn't that it?

A. They were conducted by the German Consulate, yes.

Q. Conducted by the Consulate?

A. Yes.

Q. Did Dr. Draeger conduct them?

A. I think the correct translation of that would be "under of the auspices of."

Q. Yes, under the auspices of. In other words, these various notices that were sent out to German nationals were also sent out to German-American citizens, weren't they?

A. Not that I know of.

Q. Not that you know of?

A. No.

Q. Do you know an organization called —— Well, the letters which are used are D. A. B., I cannot pronounce it in German?

[fol. 91] The Court: Deutsche-Americanisch Berufgemeinschaft. Do you know that organization?

The Witness: Yes, I have heard about it.

Q. They got these notices, didn't they?

A. Not that I know of.

Q. And that is what you mean by festivities, and these papers that I have shown you are what you call invitations, right?

A. Yes.

Q. These events were under the auspices of the German Consulate, right?

A. Yes.

Q. And these were public affairs, were they not?

A. Yes.

Q. There were notices concerning them in the newspapers, were there not?

A. I don't know.

Q. You don't know. You never saw the notices?

A. No.

Q. But there was nothing private about them?

A. The only thing I had to do with it is send them out to the people on the list.

Q. And that's all you know about it?

A. Yes.

Q. And did you only send them out to people on this list?

A. Yes.

Q. Only to these people?

A. Yes.

Q. You are sure of that?

Mr. Stanziale: She answered the question, Judge Meaney, she has answered it twice.

The Court: Well, let her be sure. Are you sure of it?

The Witness: As far as I was concerned.

Q. As far as you are concerned?

The Court: Well, that's the only question.

Q. But in the office were they sent out to other people that you saw?

[fol. 92] The Court: If you know.

A. No.

Q. You don't know of anybody else receiving these notices?

A. No.

Q. Now, your attention was called yesterday to those who didn't pay their dues; how was that indicated on these—who had stopped paying dues—on G-17?

A. Those who had stopped paying dues for what reason?

Q. Yes?

A. I don't know what you mean.

Q. Well, you testified yesterday that there were some marks on here with respect to persons who no longer paid dues and who were therefore no longer members of the Party.

A. No. The reason that they didn't pay dues was that they ceased to be members in order to become American citizens and at the same time ceased to pay dues and were crossed out.

Q. I see. Those who had made application for American citizenship?

A. Yes.

Q. Are those the names that are crossed off this list?

A. And people that returned to Germany permanently were crossed out also.

Q. People that had returned to Germany and those who had made application for American citizenship?

A. Yes.

Q. And Mr. Stanziale asked you yesterday with reference to these cross-marks and we couldn't see what he was referring to, these little green X's and these red X's, what are they?

A. Well, there were two reasons for making these crosses; first of all, I made some when I sent out invitations. You see some of the members complained that they didn't receive any invitation, so I made sure that they got them, crossed them off. The others that are crossed refer to Alien Registration. Now, I don't know when I crossed them off as I sent the letter out or as they came in to the Consulate; that I don't know any more.

[fol. 93] The Court: We will take a recess now for five minutes. The jury will be excused first.

(A short recess was taken.)

By Mr. Pearse:

Q. Now, Miss Illian, I understood you to say a few minutes ago that people who have made application to become American citizens were stricken from this list, is that right?

A. Yes.

Q. Do you know what other ways there were for a man to dissociate himself from the organization, outside of applying for American citizenship? How about non-payment of dues?

A. Not as far as I know. People came in from time to time and told Mr. Vogel——

Mr. Campbell: Could we have it a little louder?

A. (Continuing) People came in from time to time and told Mr. Vogel that they wanted to cease to be members for some reason or other and——

Q. They were then dropped from the list?

A. A report was made to Germany and then after that report was sent out, then they were crossed out from the list.

Q. Now, my attention is just called to the fact that this Exhibit G-17, which we have been talking about, is appar-

ently in two sections, the first section comprising three pages with some names written in, that is alphabetically, and then the remaining pages, four in number, are also alphabetical except near the end. Is there any distinction between these two?

A. Oh, yes.

Q. What is the distinction, as far as you know?

A. May I have it?

Q. Yes.

(Paper is handed to the witness.)

[fol. 94] A. The first three pages are the members, for members, and two pages, two and a half pages of prospective members, and then there is a section Cleveland and Boston with members and prospective members, and then there are some names from the NSKOV and then prospective members again.

* * * * * * *

Mr. Pearse: Well, I object to the admission of these papers in evidence, if the Court please, on behalf of all the defendants on the ground that it has not been shown that any of these exhibits either were prepared by or received by, or that they had anything to do with what is contained in these various exhibits, and that they should not be admitted in evidence at this time until something is shown to connect them with them.

The Court: With the defendants?

Mr. Pearse: Yes, sir.

The Court: Any other ground of objection to their admission? Any other ground from any other counsel to the admission of this evidence?

* * * * * * *

The Court: Any other ground from any counsel? All right, they will be admitted at such time as there is connection shown between the defendants and these exhibits; but no other objection will be entertained. They are admitted now except for that one ground, and that may mean only a delay in the time of admission. But so far as their materiality with this single exception is concerned, I am holding now that there being no objection, they are material and will be admitted provided the conditions outlined by Mr. Pearse are met by the United States Attorney.

[fol. 95] Now is there any further cross examination of this witness?

* * * * * * *

Cross-examination.

By Mr. Azzoli:

Q. Now, Miss Illian, I either understood you or not; but these cards were of long standing that were in the files, were they not?

A. Which cards?

Q. The cards from which you compiled the list.

A. Yes, they were filed cards.

Q. If they were made in 1936 you wouldn't know the origin of them before that time, or in 1933, would you?

A. No.

Q. And when you made the list that you brought on here, those two lists, they were made from cards which were of old standing in the office; isn't that right?

Mr. Stanziale: That is objected to, if your Honor please.

The Court: I will allow it.

A. Some of them were old, some of them were newer.

The Court: Some were made while you were there?

The Witness: Yes. It all depended when the person——

The Court: When you came there there was a file?

The Witness: There was a file.

The Court: And that file was added to while you were there?

The Witness: Yes.

The Court: Now, were you told what that file was when you came there?

The Witness: Yes.

[fol. 96] Q. And you also stated that when the person applied for citizenship or made application he would be struck off the list?

A. If he told Mr. Vogel so, yes.

Q. If he told Mr. Vogel. Now, suppose there were persons who either told Mr. Vogel or had left information at your office and he was not struck off the list, how would you follow that up, if it were possible?

A. It might have been possible.

Q. It might be possible?
A. Yes.

The Court: Well, I don't think we had better indulge in possibilities; it is possible that the roof might fall in this moment, we won't play with the idea of it though.

Mr. Azzoli: Oh, we are always subject to mistakes.

The Court: We are not dealing in possibilities, we are dealing in facts.

Q. Isn't it a fact that in instances it has occurred in that office that persons were making applications for citizenship or had given notice to the office either orally or in writing and they were not struck off that list?
A. I don't know of any such case, it might have been, I don't know.
Q. It could have happened?
A. It could.

Mr. Stanziale: I object.

The Court: We are not going to deal in possibilities, I have told you that.

Q. Do you know Edgar M. Ulrich?
A. His name is familiar, but I don't know the person.
Q. Do you know the person I mean?
A. No.

The Court: Ulrich, will you stand up?

(Mr. Ulrich rose.)

[fol. 97] Q. Do you know that gentleman?
A. I don't recall him.
Q. You have never seen him?
A. I might have seen him, I don't recall him.
Q. You don't recall him?
A. No.
Q. Now, in your line of work at the Consulate, was it not a fact that many of these people came there for reasons of the passport or for business concerning them as nationals in the line of business and duty pertaining to the Consulate himself?

Mr. Stanziale: I object. One of which people?

Mr. Azzoli: These nationals that came in there she speaks of.

Mr. Stanziale: We are not concerned with nationals, we are concerned with the membership list, G-17.

The Court: We can presume, we can take judicial knowledge of the fact that a Consulate is open to the conduct of the ordinary business of the Consulate.

Mr. Azzoli: That's it.

The Court: And that necessarily the type of activities that you mentioned would be in the normal course of the conduct of its business.

Q. Yes. And the list that you made up as passports, there was a list of persons who had come there in the natural course of business to the Consulate, in the natural course of business as the German Consul, isn't that right?

The Court: Did you make up a list of passport applications?

The Witness: No.

Q. You never kept a record of those persons who came there to have their passport visaed?

A. No, they were referred to the Passport Division.

[fol. 98] Q. Well, that Passport Division had a list, did it not?

A. I don't know, I didn't work in the Passport Division.

Q. Well, it was all one office, wasn't it?

A. No.

The Court: It was all one office in that it had a central location but it might be like the General Electric; that is one office but has endless divisions.

Q. Well, would they have to make application to your office to know what their position would be with reference to repatriating themselves to Germany?

A. No.

Q. They would have to report to you, wouldn't they, or to Mr. Vogel?

A. No, they might have asked Mr. Vogel for a visa and he referred them to the division it belonged to.

Q. Well, then they were told to report to Dr. Draeger?

The Court: No, she said they might have asked Mr. Vogel and he advised them which department to go to.

Q. Well, were they compelled to go there first or not?

A. I don't know anything about being compelled.

Q. You don't know that.

The Court: Have you got that list for me now?
Mr. Pearse: Sorry, I will make it out right away.

* * * * * * *

Cross-examination.

By Mr. Lordi:

Q. How long after a person's dues have been unpaid is he dropped from the roll; how long after, say, a person who is a member of this particular organization after his dues are unpaid, how long after is he dropped from the rolls?

A. Well, I cannot say the exact time, but it is quite a time [fol. 99] afterward and report was made to Germany. If an answer came from Germany he was dropped. It didn't happen very often.

Q. You don't know exactly how long a period of time it would take?

A. No.

The Court: Anything further from this witness?

Cross-examination.

By Mr. Cole:

Q. Miss Ilian, the red book, G-10, was, I believe, the symbol of full Party membership in this country?

A. Yes.

Q. Therefore a man did not receive this when he first applied or when he was first accepted?

A. No.

Q. And it was not until he received the red book that he would be considered a full Party member?

A. Oh, no, he got the card first, and when he got the membership card he was a full member.

Q. But was there not a distinction between the holder of the book and the holder of a card?

A. Well, the holder of the card had been a member longer than the holder of the book.

Q. And did he have additional rights?

A. Not that I know of.

Q. Do you know whether he had a right to vote at any meetings?

A. No.

Q. Do you know whether he had a right to hold office?

A. No.

Q. Do you know if he had a right to be a delegate to any convention or conference or gathering?

A. No.

Q. You do not know any of those details of the Party organization?

A. There were not any.

Q. I am asking if you know any of those facts?

A. No.

The Court: Was any such thing allowed here?

The Witness: No.

[fol. 100] The Court: They were not allowed.

The Witness: I never heard of it.

Q. Was there any voting held in your office for officers?

A. No.

Q. And were there any titles like "Colonel," "Major" or "Committee"?

A. No.

The Court: No Gauleiters?

The Witness: No.

Q. Were there any conventions or national gatherings or delegations sent to a point for meetings, delegations from all over the country of these men meeting together?

The Court: You mean Nazi meetings?

Q. Nazi meetings, delegations from each State?

A. No.

Q. Nothing like that?

A. No.

Q. And no one sent to Germany to represent the non-resident members of the Party?

The Court: To your knowledge.

A. No.

Q. To your knowledge, no one was sent?

A. No.

The Court: Anything further, Mr. Stanziale?

Mr. Stanziale: I have one or two questions, sir.

The Court: Reduce them to a minimum.

Mr. Stanziale: Yes, I will, sir.

Redirect examination.

By Mr. Stanziale:

Q. Were the payments received from the applicant in the same amount that the regular members paid?

A. The amount of the monthly payment was the same, yes.

[fol. 101] Q. Very well. And did the applicants for membership receive invitations to Party functions the same as regular Party members?

The Court: She has testified to that.

Mr. Stanziale: No further questions, Judge Meaney.

The Court: You may step down. Call your next witness.

Gustave Gauerke, called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. Stanziale:

Q. Mr. Gauerke, at or about the period of August of 1939, where were you employed?

A. At the German Consulate, Commercial Department.

Q. And at what address?

A. 17 Battery Place, New York.

Q. How long had you been employed at that particular place?

A. For 19 years.

Q. Did you know Dr. Friedhelm Draeger?

A. Yes, sir.

Q. And did you know Hans Vogel?

A. Yes, sir.

Q. Can you tell us whether Dr. Draeger and Hans Vogel were at the Consulate at 17 Battery Place, at or about the period of August, 1939?

A. Yes, sir.

Q. What was your occupation there?

A. Clerk of the Commercial Department.

The Court: What was Draeger?

The Witness: He was Consul of the Party.

Q. What party?

The Court: What was Vogel?
The Witness: Secretary.

[fol. 102] Q. Now, you mentioned the word "party." What party?
A. Nazi Party.

Q. Did he have any specific title in German?
A. No, he had no other type.

The Court: No, did he have any title?
Mr. Stanziale: In German.

Q. In German?
A. Yes, Standartefuehrer; that means flagbearer—something like it.

The Court: Standartefuehrer.
The Witness: Yes.

The Court: Is that like in for instance the Navy, the admiral of a ship has a right to show a flag?
The Witness: Well, he has——

The Court: He has the right to show a flag, not just to be a flag carrier—he rates a flag, in other words?
The Witness: I don't know exactly what the title is, but I know he is entitled Standartefuehrer.

Q. Now in the fall of 1940 was there any change in the hours in which you were employed?
A. Yes; since August, 1939, we had 24-hour service at the Consulate. For instance one term from nine to five and then another term from five to 10 and another term from 10 to nine; and on Saturdays from one to seven; from seven to 10 and 10 to nine in the morning again.

Q. Now, in the fall of 1940 did you have any duties in connection with meeting people who would come into the Consular office?
A. Yes, I was on duty some weeks from five to 10.

The Court: Was that in the afternoon?
[fol. 103] The Witness: Beg your pardon?
The Court: In the afternoon?
The Witness: In the afternoon five to 10, after business hours.

Q. Can you tell us whether any persons came to the Consulate office at that particular time, from the hours of five to 10 when you were there?

A. Yes. It was my duty to keep the door locked, the outside door, so only people could come in by special appointment. I don't know exactly whether September or October, groups of men called at night between five and 10, wanted to see Dr. Draeger. So I asked them, used to ask them who they wanted to see because they came in groups of 10 to 15, and then they said "Dr. Draeger," so I let them in.

Q. I see. Now, did you have occasion to talk to Hans Vogel at this particular time?

A. Not at night, no, I didn't talk to him.

Q. Did you have occasion to talk to him at a particular time the following day?

A. On the following day, yes, I had occasion.

Q. Now, what conversation, if any, did you have with Hans Vogel as to these people coming to the Consulate at any particular time at night?

A. I was interested to find out why so many men called at the office, so I asked two when they went out, I asked what is the purpose for coming here at night? So they said, "We get instructions how to fill in"——

Mr. Cole and Mr. Gechtman: I object.

The Court: Just a half minute. This is conversation with the people who were going out?

The Witness: Yes.

The Court: I sustain the objection.

Q. Tell us what conversation——

[fol. 104] The Court: Strike that conversation from the record.

Q. Tell us what conversation you had with Mr. Vogel as to these people coming there, what did Vogel say to you?

A. Vogel—I asked the people what they came for——

The Court: No, no; did you ever talk to Vogel?

The Witness: Yes.

The Court: What did Vogel say?

The Witness: I asked Vogel is it true that you tell these Party members coming here at night that they should fill in

in the questionnaire as an alien certain questions if I am a member of the Reichsdeutschevereinigung, and he said yes.

Q. Do you know what the Reichsdeutschevereinigung was or is?

A. Yes, we had men there from the Reichsdeutschevereinigung?

The Witness: That is association of German citizens in this country.

The Court: You mean German——

The Witness: Nationals.

The Court: Not American citizens.

The Witness: Not American citizens.

The Court: German nationals.

The Witness: German nationals, and I believe they belonged to the Labor Front, the German Labor Front.

Q. And what did Vogel say to you when you mentioned the Reichsdeutschevereinigung?

A. He said yes.

[fol. 105] Q. That's all.

Mr. Pearse: Now, will your Honor please be good enough to instruct the jury that the testimony of this witness is not at this time binding upon any of these defendants?

The Court: The same situation obtains, ladies and gentlemen of the jury, about testimony of this witness, that it is admitted as an admission on the part of Vogel, who is allegedly a co-conspirator. It will not be admissible against any of these defendants unless and until a conspiracy has been shown to exist and that they were part of the conspiracy with Vogel.

Mr. Pearse: With the Court's permission we will reserve the right at a later point to move to strike this testimony.

The Court: That is reserved as to all the testimony until the Government has borne the burden it should bear.

Mr. Stanziale: Any cross examination?

Mr. Pearse: I have no questions.

Mr. Gechtman: None.

(No cross-examination.)

Mr. Stanziale: Is Mr. Rosen here?

(No response.)

* * * * * * *

EMIL WILHELM BORCHERS, called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. Stanziale:

Mr. Pearse: May I inquire if this witness is one of the defendants named in this indictment?

[fol. 106] Mr. Stanziale: He has been severed.

Mr. Pearse: I didn't ask that question.

Mr. Stanziale: He is one of the defendants named in this indictment against whom the United States has severed.

The Court: All right.

Q. Now, Mr. Borchers, if you don't understand any question you say so. Where were you born?

A. In Germany.

Mr. Campbell: May we have it a little louder, please?

The Court: Will you speak out loud so these gentlemen can hear you?

A. In Germany.

Q. When, what year?

A. 1897.

Q. When did you come into the United States?

A. 1926.

Q. Are you a citizen?

Mr. Pearse: He dropped his voice on the last word.

The Court: 1926.

Q. Are you a citizen?

A. No.

Q. Were you a member of the Nazi Party?

A. Yes.

Q. What year did you join?

A. 1935.

Q. Where, what city?

A. Over here.

Q. Over here?

Mr. Pearse: I cannot hear him, Judge.

A. At the Consulate.

. . . . . .

Q. Where did you join the Party?
A. German Consulate.
[fol. 107] The Court: Where?

Q. German Consulate where?

The Court: In what city?

Q. In what city?
The Court: Where is the German Consulate?
The Witness: Draeger.
The Court: No, where is it?
Mr. Stanziale: Mr. Hundt, will you translate that for him?
Mr. Pearse: Oh!
The Court: Now wait. You went to the German Consulate?
The Witness: Yes.
The Court: Where is that, in Jersey City, in West——
The Witness: No, in New York; New York Battery Place.

Q. Now, when you went to the German Consulate who did you talk to?
A. To Draeger.
Q. And what did you say to Draeger?
A. I told him——

The Court: Speak up.

A. I told him I was in Germany you know, and when they told me in Germany when I go back here to United States I should go to the German Consulate.

The Court: All right, take your time. He told you to go to the German Consulate?
The Witness: Yes.
The Court: What for?
The Witness: I want to go in the Partei.
[fol. 108] The Court: You wanted to go in what party?
The Witness: Nazi Party.

Q. Nazi Party, you mean?
A. Yes.
Q. What else was done when you were at the German Consulate office that day?

. . . . . .

The Interpreter: "He was accepted in the list."

Q. Did you pay any money to Dr. Draeger on that day?
A. No.

Q. When did you start to pay money?

The Interpreter: He was notified when he received the gray identification that he had to pay his dues.

Q. Did you subsequently receive a gray identification card?
A. Yes.

The Court: I think probably you had better stand down there near Mr. Stanziale and then you will serve the purpose by speaking out loud yourself and having him speak out loud.

Q. How long after you saw Dr. Draeger did you receive the gray card?
A. That month.

Q. And after you received the gray card did you start to pay money?
A. Every month.

Q. And how much did you pay?
A. One dollar.

Q. Did you bring the money to the Consulate personally or did you send it by mail?
A. Personally.

Q. Do you know Hans Vogel?
A. Yes.

Q. When and where is the first time you saw Hans Vogel?

The Interpreter: When he was entered.

[fol. 109] Q. Entered for what?

The Interpreter: He had to fill out a large sheet.

Q. And where was the sheet filled out?
A. By Vogel.
Q. Where?
A. Vogel.

The Court: Was he at the Consulate?
The Interpreter: Yes.

Q. Now, did you subsequently receive a full membership book into the Nazi Party?

A. Yes.

Q. How long after you saw Draeger in 1935, as you have testified, did you receive the Nazi membership book?

The Interpreter: He called for the membership book.

Q. When did he receive the book of his membership?

A. Two years after 1935.

Q. When you had made application for membership and paid your dues of a dollar a month what evidence of payment did you receive from the German Consulate office?

The Court: Ask him before he was actually a member did he pay dues, before he got his book.

The Interpreter: When he was a member he paid dues.

The Court: Did he pay dues before he got his book?

The Interpreter: Yes.

The Court: How much did he pay?

The Interpreter: One dollar a month.

The Court: When did you start paying that?

The Interpreter: 1935.

[fol. 110] Q. What did you get as a receipt for your dollar a month?

A. A small blue stamp.

Q. What did you do with this stamp?

The Interpreter: He took it home.

Q. Did you get a card from the German Consulate?

A. No.

Q. Now, after you started to pay your dollar a month did you receive any invitations from the German Consulate?

A. Yes.

Q. What kind of invitations were they?

A. They were invitations for the Turn Hall in New York.

Q. Did you go to the Turn Hall in New York in the year of 1935 when you first applied for membership?

A. (In English) Not before.

Q. In the year of 1935, after you made application for membership in the Nazi Party did you receive any invitation to go to the Turn Hall from the German Consulate?

A. Yes.

* * * * * * *

Q. Mr. Borchers, I show you an exhibit that is marked G-34 for Identification and ask you if you received an invitation from the German Consul, Dr. Friedhelm Draeger as Consul and Kreisleiter, to attend the birthday celebration in honor of Adolf Hitler?

A. No.

Q. You don't remember receiving such an invitation from the German Consul, Dr. Draeger?

Mr. Pearse: Well, I object to the form of that question. I have kept my mouth shut for quite a while, Judge. I object to describing these things as invitations.

The Court: Let's see what it is.

[fol. 111] Mr. Pearse: They are notices of festivities as they call them.

The Court: Well, I suppose you are right that it is a notice which contains a very pregnant comment that is underlined in the German: "It is a duty of honor for all Party Members and their families to attend the birthday celebration." Now, that might not strictly be an invitation, but it is an indication. The question is do you recall having received a notice like that?

The Witness: No.

Q. Well, did you go to such a celebration on April 20th, 1940?

The Court: It doesn't make any difference.

Mr. Pearse: I object.

The Court: I sustain the objection.

Mr. Stanziale: Then as I take it, your Honor doesn't desire me to go into these Party functions and so forth?

The Court: I am confining myself to ruling on this particular question at the moment. I have indicated that I dont' think it is very effective to proceed any further along that line.

Mr. Stanziale: Very well; if that is your Honor's feeling I won't waste any more time on that.

Q. On September the 1st or the 2nd of 1940, did you have occasion to go to the German Consulate's office?

The Interpreter: What was the date, please?

Mr. Stanziale: On September the 1st or the 2nd of 1940.

[fol. 112] Q. (Continuing:) Or the early part of September of 1940?

A. Yes.

Q. What did you go there for?

The Interpreter: He was called there.

Q. Who did you see at the German Consulate's office at that time?

A. Vogel and Draeger.

Q. What, if anything, did Vogel and—I withdraw that.

The Court: We will recess now until two o'clock. The jury will be excused first.

(Noon Recess.)

Afternoon Session

EMIL BORCHERS resumed the stand.

Direct examination.

By Mr. Stanziale (Continued):

Q. Mr. Borchers, at the time that you went to the Consulate's office and saw Dr. Draeger and Vogel there what, if anything, was said to you?

The Court: This is September 1940?

Mr. Stanziale: Yes, September, 1940, your Honor.

A. He was told that they would soon have to register.

Q. What else was said?

A. He said nothing else.

Q. Did you later go to the Consulate's office in connection with your alien form?

A. Yes.

The Court: When was that?

A. (In English) Forty, 1940.

[fol. 113] The Court: What month?

The Witness: It was after the registration.

Q. After September of 1940, after you were advised by the Consul that you would have to register, did you go back and talk to the Consul about registering?

A. No.

Q. Did you have any conversation with either Dr. Draeger or Mr. Vogel about registering?

A. Mr. Vogel told him——

Mr. Campbell: May we have the date fixed, your Honor?

The Court: September, 1940 he is talking about.

The Interpreter: Mr. Vogel told him that they would have to register.

Q. What did he say in connection with registering about your Party membership?

Mr. Pearse: I object to that question as leading.

The Court: What else was said about registering, if anything?

The Interpreter: He said that when they went to register they were not to state that they were organized.

Q. Organized as to what?

A. The Nazi Party.

Q. All right. Now, did you register?

A. Yes.

Q. At the time that you registered did you mention that you were a member of the Nazi Party?

A. No.

Mr. Pearse: I object, if the Court please. What he did is certainly not binding on any of the rest of these defendants.

The Court: Well, he has answered "No" and I don't think it is harmful.

[fol. 114] Q. Why didn't you mention the fact that you were a member of the Nazi Party?

Mr. Pearse: I object.

Mr. Stanziale: I would like to be heard on that, Judge Meaney, if I may.

The Court: Go ahead.

Mr. Stanziale: This witness has testified that Vogel told him when he went to the Consul's office that he should not mention the fact that he was a member of the Nazi Party.

Mr. Pearse: That was not his testimony.

The Court: That they were not organized.

Mr. Stanziale: And the next question was: "Organized as to what?" and he said "Nazi Party." That is my recollection of the testimony. Now, in view of that testimony,

sir, and the fact that he subsequently registered and didn't mention that he was a member of the Nazi Party, I believe that I have a right to ask this witness why he didn't mention the fact.

The Court: What difference does it make why he didn't.

Mr. Stanziale: Because he received instructions.

The Court: Well, he said he received instructions and when he registered he did not mention his connection with the Nazi Party.

Q. Did you ever have a conversation either with Draeger or Vogel in connection with your Party membership book?

The Interpreter: He was told to turn in the membership book at the Consulate.

Q. Who told you to turn in your membership book to the Consulate?

A. Vogel.

[fol. 115] The Court: Did Vogel tell you why?

The Witness: Yes.

The Court: What did he say?

The Witness (In English): Otherwise you would come in trouble again.

Mr. Pearse: I didn't hear him.

The Court: "Otherwise he would come in trouble."

Mr. Pearse: What was that, Judge?

(Answer repeated by the Court.)

Q. Now when you refer to the membership book do you have reference to your Nazi membership book?

A. Yes.

Q. Can you tell us when—I withdraw that.

Did you bring your book personally to the office of the German Consulate at 17 Battery Place in New York?

Mr. Pearse: I object, if the Court please, how can that possibly be binding on any of the defendants whether he brought his book personally or didn't bring it?

The Court: I think it may show a line of conduct on the part of a confessed member of the Party, which may or may not be material, depending on what further facts are shown. I shall allow it.

A. Yes.

Q. And who did you hand your book to?

A. Vogel.

Q. At the time that you brought your book to the Consulate's office were there any other party members present?

A. No, I was alone.

Q. Referring back to the conversation had with Vogel

The Court: When?

[fol.116] Q. (Continuing) —In September of 1940 at the time you were instructed not to disclose your membership, were there any other Party members present at that particular time?

A. There were three people there.

Q. Did you ever receive back from Vogel or Draeger or anyone else connected with the German Consulate the return of your membership book?

A. No.

Q. At the time that you received your membership book, which I believe you testified was some time in 1937 or two years after you filed your application in 1935, who did you get your membership book from?

A. Consulate (in English).

Q. And when you say Consul, who? The name of the person? What name?

A. Vogel.

Q. Did you receive the membership book at the office of the German Consul?

A. Yes.

(A paper is marked G-42 for Identification.)

Q. And your dues were paid always at the Consulate's office?

A. Yes.

Q. I show you an exhibit which is marked G-42 and ask you if the signature that appears thereon is your signature?

A. (In English) Yes.

Mr. Stanziale: What is the answer, Mr. Interpreter?

The Interpreter: Yes.

Q. And is that your signature to your Alien Form filed with the Department of Immigration and Naturalization in connection with your 1940 Alien Registration?

A. (In English) Yes.

Q. Can you tell us who filled out this form which is identified as Government's Exhibit 42 for Identification?

The Interpreter: He was there alone.

[fol. 117] Q. Who put the typewritten matter in the exhibit?

Mr. Stanziale: I will withdraw the question.

Q. Where was the exhibit filled out?
A. (In English) Post office.

The Interpreter: In the post office.

Q. Was any form related to that exhibit filled out at the German Consulate's office?

Mr. Pearse: I object to that question because I don't understand what it means.

(Question repeated by the reporter.)

Mr. Pearse: I don't know what that means.
The Court: Reframe it, Mr. Stanziale, it might be significant to Mr. Pearse.

Q. Was a duplicate of Exhibit G-42 in evidence filled out at the office of the German Consulate before you filed Exhibit G-42 in evidence?
A. No.

The Court: Did you copy that from anything? Do you understand that question?
The Witness: No.
The Court: What I asked you is this— Where is that——
Mr. Stanziale: The original is here, sir. Who typed the answers, who typed that?
The Witness (In English) That is in the post office.
Mr. Stanziale: Who did it?
The Interpreter: Some one did fill it out at the post office.
[fol. 118] The Court: Who gave the information that they used to fill this out with?
The Interpreter: He was asked that.
The Court: Did you have any other paper to which you referred when you gave this information?
The Witness (In English): No.

The Interpreter: No.
The Court: All right, go ahead.

Q. Now, Mr. Borchers, at the time in September of 1940, when you and three other persons were present in the Consulate's office were told by Vogel not to admit——

Mr. Pearse: Now, I object to counsel—I am going to interrupt him right in the middle of his question—repeating the testimony and asking questions, he knows better than that, sir.
Mr. Stanziale: I think I have a right if your Honor please—my question leads right up to the foundation I am laying.
The Court: Why don't you just ask the straight question without all the preliminaries.

Q. At the time you were in the Consulate's office in September of 1940 when you received instructions from Vogel what, if anything, did you say to Vogel when you were told not to mention your party membership?

The Interpreter: He said what he should do.
The Court: No, what did you say to Vogel?

(Witness shakes his head in the negative.)

Q. Answer, answer, don't shake your head.

The Interpreter: He doesn't know.

[fol. 119] Q. Up to what year did you pay your dues in connection with your membership in the Nazi Party?
A. 1940.
Q. Was it after you had filed your Alien Registration Form of 1940?

The Interpreter: Whether he still paid after that?
Mr. Stanziale: Yes.

A. (In English) No.

The Interpreter: No.

Q. How many functions of the organization did you attend per year from the time that you joined until the last time that you paid dues?

Mr. Pearse: I object to the form of that question, if your Honor please, because it hasn't been shown yet that the organization had any functions.

The Court: Functions sponsored by the Consulate.

Q. Or functions sponsored by the Consulate?

The Interpreter: Will you repeat that, please?

Mr. Stanziale: May I reframe that?

The Court: Reframe the question.

Q. From 1935 until the last time you paid dues in 1940, can you tell us how many functions under the auspices of the German Consulate did you attend per year?

Mr. Pearse: Per year?

Mr. Stanziale: Yes, how many functions did you go to from 1935 to 1940?

Mr. Gechtman: I object to that, because anything that happened prior to the dates alleged in the indictment is inadmissible.

[fol. 120] The Court: That isn't quite true as a principle of law.

Mr. Gechtman: I would refer to—

The Court: But I shall sustain the objection and confine it to between the period of 1939 and——

Mr. Stanziale: 1941.

The Court: —1941.

Q. How many functions under the auspices of the German-American Consul did you attend in the year 1939?

The Interpreter: You mean the German Consul?

Mr. Stanziale: The German Consul? Yes.

A. Twice a year.

Q. At the time that you attended the function or both functions, as you testified, in the year of 1939, can you tell us whether the Nazi flag was displayed at this particular function?

Mr. Pearse: I object to that, if the Court please, what difference does that make?

Mr. Stanziale: There is testimony by Miss Illian that the functions were sponsored under the auspices of the German Consulate.

The Court: Well all right, under the auspices of the German Consulate, that's all right.

Mr. Stanziale: I don't press it, Judge Meaney.

Q. Can you tell us when you attended these functions whether Dr. Draeger or Mr. Vogel were there?

A. Yes.

Q. What, if anything, did either Dr. Draeger or Mr. Vogel do at the time that they were present at the functions?

Mr. Pearse: Well, if the Court please, that is an assumption that they did the same thing all four times and I don't [fol. 121] think that the witness has indicated any such thing.

The Court: What are you trying to show?

Mr. Stanziale: I am trying to show that members of the Party were there, that the Heil Hitler salute was given by Dr. Draeger and that the members in the audience returned the salute to him.

The Court: What difference does that make?

Mr. Stanziale: I want to show the function of this organization within this particular period of time within the United States, and I am laying the foundation for photographs that I have.

The Court: He hasn't shown what the functions were, first.

Mr. Stanziale: He has shown that they were functions under the control——

Mr. Pearse: "Under the auspices" was the word the young lady used.

The Court: Under the auspices the word was used, and we will also take cognizance of the words used in the notices sent out by the Consul. In any event, these affairs which you have referred to——

Mr. Pearse: Festivities.

The Court: (Continuing) Festivities, were held under the auspices of the German Consulate. Now, I will take judicial notice of the fact that the Nazi swastika flag was the national flag of the German Reich, so that they had a right in 1939 and 1940 and 1941 to show that flag.

Mr. Pearse: Yes.

The Court: How would it be significant then?

Mr. Stanziale: Other than this;—I have subpoenaed the application for license to hold these functions by Dr.

[fol. 122] Draeger and I have the exhibits here and I am laying the foundation through this witness.

The Court: They were there; he says he was at them and they were there.

Mr. Stanziale: I think I have a right though at this particular place, Judge Meaney,—the meeting opened with the Heil Hitler salute and the members returned the Heil Hitler salute at these particular functions—to show that they were exclusively functions of the Nazi Party within the United States.

Mr. Pearse: Now, I object; I don't think counsel has a right to make a statement like that, that isn't anything which is in evidence. Is that what you expect to prove?

Mr. Stanziale: I am trying to bring it out.

The Court: Go ahead and prove it.

Q. At the meetings in 1939 that you attended what, if anything, did Dr. Draeger do in connection with opening the meeting or the function?

Mr. Pearse: May we have those meetings identified one by one to see what they were, first?

The Court: Well, let's see. Was a general course of procedure followed in the opening of all these meetings?

The Witness: Dr. Draeger started the festivities with the Heil Hitler greeting.

Q. Then what happened?

A. Then the music played.

Q. What music was played?

A. (In English) What they call it here?

The Interpreter: The American national emblem and Deutschland uber Alles.

[fol. 123] Q. After the music was played what, if anything, did the members of the audience do?

Mr. Gechtman: I object to that.

The Court: What was the response to the greeting "Heil Hitler" on the part of the audience? You may object to that too, if you want to.

The Witness: They also got up.

Q. And did what?

A. Stretched out their hands.

The Court: Did they say anything?

The Witness: There was some who said Heil Hitler, but all of them did not say Heil Hitler.

Q. Was the Horst Wessel song played at these meetings?

Mr. Gechtman: I object as leading.

The Court: Oh, let him answer. Was any other music played?

The Witness: (In English): Yes, dance music.

The Court: Only dance music?

The Witness (In English): Dance music.

Q. Will you ask him if the Horst Wessel song was played?

A. (In English) No.

Mr. Gechtman: I object to that.

Mr. Pearse: I asked my friend to withdraw the objection.

Mr. Stanziale: I will make you both happy, I won't ask the question again.

The Court: Well, he has answered, he said "No," so that makes somebody unhappy.

(A paper is marked G-43 for Identification.)

[fol. 124] Q. I show you an exhibit that is marked G-43 for Identification and ask you if the signature that appears thereon and the picture thereon are your signature and picture?

A. (In English) Yes.

Q. And did you file that application with the Immigration and Naturalization Department in connection with your 1942 registration?

The Interpreter: He went himself to the post office.

Q. Was that application, which is Exhibit G-43 for Identification, filed by him?

A. Yes.

Mr. Stanziale: I have no further questions, your Honor.

Mr. Pearse: No cross-examinations. Now, if the Court please, may I ask your Honor again to instruct the jury that so far as the testimony of this man is concerned, it is in nowise binding on any of the defendants.

The Court: Mr. Pearse, if it is not connected up, the whole thing will go out the window anyhow, and if it is connected up it will bind the defendants. I repeat it.

Mr. Pearse: I just want the jury to understand that. That's all.

Q. All right, Mr. Borchers.

[fol. 125] ALBERT J. KOMECKI, called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. Stanziale:

Q. Where are you employed, sir?

A. Department of Licenses, City of New York.

Q. And just what are your duties, sir?

A. Clerk.

Q. Do you have access to the records of your department?

A. Yes, sir.

Q. Now, you have been served——

Mr. Pearse: Mr. Stanziale, if you would get out what you want maybe we can save some time.

Q. Will you produce the record pertaining to an application for a motion-picture Exhibit number 16055; do you have that with you?

A. Well, there are a number of them, sir, which date do you want?

Q. Are they all the same number?

A. Yes, sir.

Q. All right. The date of April 20, 1938.

Mr. Gechtman: Didn't your Honor limit the questioning along this line to 1939 and '40, sir?

The Court: Mr. Pearse has asked Mr. Stanziale to produce what he wants and then see if you can agree on it.

A. April the 20th, 1938—I don't believe I have that one; I don't think that was subpoenaed.

Q. Very well. If you haven't got that, have you one as of the period of August the 5th?

A. August the 5th, 1938, Yes, sir.

Q. May we have the exhibit as of November 9, 1938?

A. November 9, 1938? Yes, sir.

Q. January the 30th, 1939?
A. Yes, sir.
[fol. 126] Q. March 9, 1939?
A. March the 9th, yes, sir.
Q. April 20, 1939?
A. Yes, sir.
Q. July 6th, 1939?
A. Yes, sir.
Q. October 19th?
A. 1939?
Q. Yes.
A. Yes, sir.
Q. November the 9th, 1939?
A. November the 9th, 1939, yes, sir.
Q. January 3d, 1940?
A. Yes, sir.
Q. March the 8th, 1940?
A. Yes, sir.
Q. April 19, 1940?
A. Yes, sir.
Q. And May 1, 1940.

Mr. Pearse: Are those copies?
Mr. Stanziale: Yes.

A. Wait a minute; May 1st, 1940, yes, sir.

Mr. Pearse: All right. We have the photostats here, Judge. He needn't drag out the originals unless he wants to.

Mr. Stanziale: May we have this marked for identification? I think there is——

Mr. Pearse: There is no question as to their authenticity, if the Court please, and the photostatic copy, if your Honor desires, we will consent to have used instead of the original.

The Court: But you are not admitting their admissibility?

Mr. Pearse: No, sir.

(Papers are marked G-44 to G-55 for Identification inclusive.)

Q. In connection with the application made, Mr. Witness, at the time, or from the records that you have in your possession, under what name were the applications made?
[fol. 127] Mr. Pearse: Weren't these the applications?
Mr. Stanziale: Yes.

Mr. Pearse: Well, they all appear there who made the applications.

The Court: I don't know, I am not going to look them all over. Were they all the same names?

The Witness: No, your Honor.

The Court: Let's have a few of them.

The Witness: On some of them the names of certain officials are given.

Q. Of what association, sir, first?

A. Well, most of them are for the German-American Festival Committee.

The Court: Let me have them.

The Witness: The address, would you want the address, sir?

Q. Yes.

A. It is given as 1253 Lexington Avenue, Manhattan.

The Court: Well, here, let's have those. "If the applicant is a partnership"—Who are they? What you are driving at is the names of the——

The Witness: Officers.

The Court: Officers. All right. Now we know the one significant fact. Please don't refer to any of the names on them until we see whether they are admissible or not.

Q. Does the name of the applicant appear on the exhibit?

A. Yes, sir.

The Court: The name of the applicant plus the names of the officers, where an association is mentioned appear on them?

The Witness: Yes, sir.

[fol. 128] Q. And is that required under the laws of the State of New York?

A. Yes, sir.

Mr. Stanziale: No further questions.

Cross-examination.

By Mr. Pearse:

Q. And these exhibits which have just been referred to, they are applications which have to be made by any organ-

ization to the licensing bureau of New York where public functions are to be held; is that right?

A. They are applications for motion-picture exhibition permits. That is not necessarily a function. I mean for any function where a motion picture is to be exhibited.

Q. Oh, these were all motion picture applications?

A. Yes, these were all for motion picture exhibit permits.

Q. And it was necessary to secure them, for purposes of safety; is that it?

A. Yes, sir, required by the laws of New York City.

Q. Where the public were invited to attend?

A. Yes, sir.

Q. That is all.

* * * * * * *

ROBERT L. BELL, called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. Stanziale:

Q. Mr. Bell, are you an Agent of the Federal Bureau of Investigation?

A. I am.

Q. Do you know the defendant Jacob Friedrich Mayer?

A. Yes, I do.

Q. Will you point out Jacob Friedrich Mayer in the courtroom if you see him?

A. He is the gentleman sitting right there (indicating).

[fol. 129] Mr. Stanziale: Will you please stand, sir? May we have the name of the person identified for the record, what is your name?

Mr. Mayer: Jacob Friedich Mayer.

Q. Did you have occasion to talk to Mr. Mayer?

A. Yes, I did.

Q. When was that?

A. On two days.

Mr. Jackson: Your Honor, I respectfully object to this line of examination as representing Mr. Mayer, unless the

matter is more definitely set forth. I feel that I must object to any questions raised such as this.

The Court: Well, the question is about a conversation between the witness and Mayer himself.

When, Mr. Stanziale?

Mr. Stanziale: I just was coming to the date, sir.

The Court: Well, let's have it.

Q. What date was it?

A. On two dates, November the 22nd and 23rd of 1943.

The Court: What is the basis of your objection?

Mr. Jackson: I don't think that it is binding on these men in this proceeding.

The Court: Well, if he makes an admission against his interest certainly it would be. I don't know what the conversation is going to prove to be.

Mr. Jackson: Well, was it an examination that he is speaking of now, or a mere conversation?

The Court: He said a conversation. Now, if you think it was a statement made under improper circumstances we will try and bring that out; but if it was simply an ordinary admission against interest it would be admissible.

[fol. 130] Mr. Pearse: What was the date?

Mr. Stanziale: November the 22nd, 1943.

Q. What conversation did you have with Mr. Mayer?

Mr. Pearse: Well, now, if the Court please, on behalf of the defendants whom I represent I object to any such conversation at this time. I know that anything that was said on that occasion would not be binding on the defendants whom I represent, yet at the same time I assume——

The Court: Unless they were present.

Mr. Pearse: Unless they were present.

The Court: Or unless a conspiracy be shown.

Mr. Pearse: Yes, and I respectfully submit to the Court that the proof is not yet sufficient from which the Court could say that a conspiracy existed between these Consul attaches and the Consul himself and the rest.

The Court: You object to testimony even against Mayer?

Mr. Pearse: Yes, because it is after the event.

The Court: No, this is in 1943 and the period of the conspiracy alleged in the indictment ran up to the date of the filing of this indictment, which was 1944.

Mr. Pearse: If the Court please, so far as the proof goes nothing happened after the spring of 1941.

The Court: Up to the present time, but before we started taking evidence no evidence was shown. We cannot just get a birdseye view of the complete picture, we have to take it piecemeal. If this is not material I shall strike it from the record; but it is within the period set forth in the indictment during which the conspiracy is alleged to have con-
[fol. 131] tinued. This is a statement made by one of the alleged conspirators and would certainly be admissible against him if not against the others. I will say now that it would be admissible against the others only under the principle which I have already established and enunciated three or four times.

Mr. Pearse: You see, if the Court please, the reason why I am objecting is this: that when a conspiracy ends, when the proof shows that a conspiracy ends, if one ever existed——

The Court: But the proof is not all in yet, and there is no proof that the conspiracy was even entered into.

Mr. Pearse: And if the Court please——

The Court: Or there may not be—I am not passing on that definitely, but there may not be; but we have to take this thing piecemeal; in the absence of a written or direct oral agreement entered into, we have got to take circumstances from which the jury might be justified in inferring certain things.

Mr. Pearse: Yes, sir, I know, but I say that now attempting to prove out of the lips of one of the defendants the fact that a conspiracy might have existed, I say is improper at this time, because the proof up to the present point from the lips of those who are not co-conspirators or not defendants named here, is that the last act which may have been done which might be included as acts in connection with the conspiracy was the payment of dues by some of them, as Miss Illian testified, up to May, 1941. Now, tl s is a statement which apparently was taken about the latter part or some time in 1943.

The Court: Do you think it would be admissible as against a person making it?

[fol. 132] Mr. Pearse: Not to prove a conspiracy, no.

The Court: Suppose he makes admissions as to certain acts which he did?

Mr. Pearse: That would be quite all right, sir.

The Court: I don't know what it is going — be, you see, Mr. Pearse, nor do you know what it is going to be.

Mr. Pearse: Well, I assume——

The Court: Now, suppose we go ahead and hear what he has to say, and if it be objectionable you may make your objection. I cannot anticipate what he is going to testify to.

Mr. Pearse: Your Honor will allow me to have an exception?

The Court: You may have an exception.

Mr. Campbell: May that apply also——

Mr. Azzoli: To the other defendants?

Mr. Pearse: That is understood I think, that when one takes an exception it applies to all.

The Court: Yes, you needn't all bob up.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Jackson: Your Honor, as I understand this indictment, notwithstanding the wording, and as I understand a case to which I will be pleased to cite your Honor later, when the overt act has taken place or the series of acts, at the latest date that terminates and as you might say, there cannot be then a further overt act, and that is limited to December some date in 1940. I made this objection because this runs into 1943.

[fol. 133] The Court: It isn't limited as to then, the indictment charges——

Mr. Jackson: The case held that after the overt act has been committed——

The Court: The last overt act charged in the indictment, true, would be the end of 1940.

Mr. Pearse: December is the latest.

The Court: December of 1940, but that, as I conceive it, does not prevent the Government from showing that there were other overt acts not recited or set forth in the indictment.

Mr. Jackson: As I understand the Federal Attorney to say, they limited themselves to— This case which I am referring to, without mentioning it just now, limits it to the allegations in the indictment and proof there with respect to those; I think the attorney limited himself to that.

The Court: It limited the conspiracy to the last overt act stated in the indictment?

Mr. Jackson: Yes, sir.

The Court: Let me see that. What is the citation?

Mr. Jackson: That, your Honor, is in 13 Fed. (2d) it is a Circuit Court of Appeals case.

The Court: Will you get that 13 Fed. (2d). What circuit is it?

Mr. Jackson: Your Honor, I cannot read my own writing—Optner vs. United States, I think it is 13 Fed. (2d) page 11.

The Court: Have you any other authority that you intend to cite while I am sending for this?

Mr. Jackson: As a matter of fact, there are a lot of authorities in that case, but I didn't have an opportunity to run them down.

The Court: Get 13 Fed. (2d). What page is that, please?

[fol. 134] Mr. Jackson: The case page number is 11.

The Court: Optner vs. United States, is that it?

Mr. Jackson: It starts out, your Honor, "Under"——

The Court: Optner vs. United States?

Mr. Jackson: Yes, sir, that is the case.

The Court: What principle do you say that stands for?

Mr. Jackson: It stands for the principle, your Honor, that the last overt act in a series of overt acts alleged in the complaint, that having been effected there cannot be a further overt act. That is the language, practically, that I copied down in a hurry and I am sorry I cannot give you the page.

The Court: Well, suppose you look it up and let me have the exact page because that is a bankruptcy case, not a conspiracy case. It seems to me there is something set forth about the last act to be considered in the determination of the bankruptcy, but I wouldn't take that as a precedent for establishing a rule in a conspiracy case.

Mr. Jackson: Your Honor, I don't know whether that is copied from here, but the case that I really had here which must be the one that I am referring to, probably mixing it up with this one, is the case of Lonabaugh vs. United States, 179 Fed. 476. This doesn't seem like the case I had in mind.

The Court: It certainly doesn't seem as though it is applicable to me. We will turn to the other one.

Mr. Jackson: No, I think there is a mistake in copying that down.

The Court: You say 179 Fed. 476?

Mr. Jackson: 179 Fed. 476; 478 is the page referred to, that is the one that I wanted to have.

[fol. 135] The Court: I will send for that.

Mr. Jackson: Thank you, sir.

Mr. Pearse: Mr. Jackson, will you come up to the Court, may we speak to your Honor in the presence of Mr. Stanziale?

(Side bar colloquy.)

The Court: Mr. Pearse, I have already ruled on your objection, have I not?

Mr. Pearse: Yes.

The Court: And given you an exception. Mr. Jackson, I shall overrule your objection and give you an exception, and both of those exceptions will be accredited to all counsel for all defendants.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Q. All right, Mr. Bell, tell us what the conversation was.

The Court: I will say, ladies and gentlemen of the jury, that I have no means of knowing what this testimony will be, nor have you; but if it be in the nature of an admission on the part of the person with whom this witness is alleged to have spoken, it will be admissible at this time only as against this defendant who is supposed to have had the conversation; and if the conversation took place after the expiration of the conspiracy, it will be admissible against him and can under no circumstances be used against the balance of the alleged conspirators. All right, proceed.

Q. Tell us what the conversation was.

[fol. 136] Mr. Pearse: Now, if the Court please, I am sorry to object, but I object to the conversation until it is first shown where it was had and under what circumstances.

The Court: All right.

Q. Tell us, Mr. Bell?

A. The conversation took place on November the 22d, 1943, beginning at his residence in Hasbrouck Heights, New Jersey; it was continued in the office of the Federal Bureau

of Investigation in Newark, and on the following day it was continued at Ellis Island, New York, which is the detention station for the Immigration and Naturalization Service.

Q. Tell us what the conversation was, beginning at his home at Hasbrouck Heights.

Mr. Pearse: I object on the further ground, if the Court please, that this testimony was taken while this defendant was about to be taken into custody and was taken into custody and cannot be used for the purpose of proving the corpus delicti; and I respectfully submit to the Court that the corpus delicti has not yet been proved to the Court by other testimony.

Mr. Stanziale: Does your Honor desire to hear me?

The Court: Yes.

Mr. Stanziale: In the first place, if your Honor please, I conceive the evidence shows—there has been offered, which your Honor said would be accepted in evidence, subject to connection, a list of party members as identified in Government Exhibit G-17; there has already been admitted in evidence from the testimony of the lips of witnesses, that the Nazi Party was a party existing and functioning in the United States as far back as 1935.

[fol. 137] The Court: In other words, you think there is sufficient evidence to indicate the existence of a conspiracy?

Mr. Stanziale: Yes, your Honor.

The Court: In which Vogel and Draeger at least——

Mr. Stanziale: Were members.

The Court: —were involved; and that therefore the corpus delicti has been sufficiently proven to warrant the reception of further evidence?

Mr. Stanziale: As to other participants in this conspiracy.

The Court: What have you to say to that?

Mr. Pearse: I submit the Government has failed up to this point to prove that a conspiracy existed between these co-conspirators—these co-conspirators that I am talking about are Draeger, Vogel and Fritz Zeglin, I think is the other name, and any of these defendants who are named in the indictment. Now, the mere proof of a conspiracy existing between alleged co-conspirators before it can be——

The Court: Well, what is the corpus delicti as you conceive it?

Mr. Pearse: The unlawful agreement.

The Court: The unlawful agreement, yes.

Mr. Pearse: But the unlawful agreement must be made with those who are named as co-conspirators and one of the defendants or more.

The Court: No. You see, Mr. Pearse, I think you are working under the idea that the Government must prove a conspiracy and prove that all of these men were members of the conspiracy before any statement can be used from any of them.

Mr. Pearse: Oh, no, sir.

[fol. 138] The Court: If the existence of a conspiracy has been proven in which some of the persons mentioned in the indictment are involved, I think the corpus delicti is proven sufficiently. Now, then, participation by individual defendants may be the subject of further proof. It would not be necessary to prove the corpus delicti to prove that they were members of the conspiracy. The existence of an unlawful agreement constitutes the essence of the conspiracy.

Mr. Pearse: You and I are not in any disagreement on that, it is only the application of the rule.

The Court: I shall hold that there is sufficient evidence for the jury to consider in order to infer the existence of a conspiracy. I cannot find myself, and the Government would not wish me to find, as a matter fact that the Government has proven the existence of a conspiracy because I would then be assuming the functions of the jury. I therefore rule that there have been sufficient facts adduced so far to justify the inference by the jury of the existence of a conspiracy. Now, I am not passing as yet upon whether there has been any evidence of the actual participation by any of these particular defendants in that conspiracy, but I say that the corpus delicti has been proven sufficiently to permit the introduction of this evidence and you may have an exception to that ruling, which will be valid for all defendants.

(Which exception is hereby allowed and seal l accordingly.)

Thomas F. Meaney. (Sealed.)

Q. All Mr. Bell, we can proceed now. What conversation did you have?

[fol. 139] The Court: First of all, at his home.

A. The conversation started out, I asked him certain questions referring to his personal background.

The Court: First, did you tell him who you were?

The Witness: Yes.

The Court: All right, tell us what you told him.

The Witness: When I first saw him I identified myself as a special agent of the Federal Bureau of Investigation; I also asked him for permission to search his residence, which permission he gave me in writing. After completing a search of his residence I asked him certain questions about his personal background, when and where he was born and entered the United States and questions of a similar nature. Then I asked him a question about his membership in the Nazi Party in this country. After a few questions along this line we then went to the office of the Federal Bureau of——

The Court: What did he say about the membership?

The Witness: At that time he denied that he was a member of the Nazi Party.

Q. Go ahead.

A. I asked him if he would come with me to our office located in the Raymond-Commerce Building in Newark, told him that at the office there we had certain exhibits that we wanted to show him, and ask him questions about, and would he come with me. We continued the questioning at the office of the Federal Bureau of Investigation and as of that date, November the 22d, he did not admit that he was a member of the Nazi Party.

Q. Now, when did you next have a conversation with him?

A. The following morning.

[fol. 140] Q. What conversation took place the following morning?

The Court: Where was he then?

The Witness: He was at Ellis Island in the custody of the Immigration and Naturalization Service.

A. The following morning he admitted that he had joined the Nazi Party in this country.

Mr. Jackson: I object, if your Honor please, as to the word "admitted."

The Court: Just tell us the conversation.

Q. What did he say?

The Court: What did you say to him and what did he say to you, giving us to the best of your recollection the actual language, not the conclusion that you drew from what he said.

The Witness: Yes, sir.

A. The following morning when I started talking to him he appeared to be quite upset.

The Court: No, no, you tell us what he said.

Q. Did you ask him whether he was a member?

The Court: Don't lead him now. This man knows what his conversation was. Tell us the conversation with the particular defendant you identify.

Mr. Jackson: Your Honor, may I have that previous statement of the witness stricken out?

The Court: Yes, give us in substance to the best of your recollection the conversation which you had with—what's this man's name?

The Witness: Mayer.

[fol. 141] Q. Friedrich Mayer?

A. First I asked him questions about attending the Consulate or going to the Consulate to visit there, which on the previous day he had denied, and later he admitted —I beg your pardon.

The Court: Later he said what?

A. (Continuing:) Later he said, "I might as well tell you the story." He then said that he had made application for membership in the Nazi Party, that he had attended certain meetings in New York; he also said that at the instructions of Mr. Vogel, that he had failed to list his membership in the Nazi Party in his Alien Registration form of 1940.

Q. Was there any conversation as to when he joined the Nazi Party?

A. Yes, there was considerable conversation along that line.

The Court: Tell us what it was.

A. First he said that he was a member of the Party for less than two years. He stated that the reason why he came to that conclusion, he received a membership card that had a space on the reverse side of it for 24 stamps, indicating that he had paid his dues for a period of a month at the time he turned this card in to the Consulate in 1940.

Mr. Jackson: I object, if your Honor please, to that statement unless he establishes it as a fact. He said "At the time he turned the card in." How does he know that he turned the card in.

The Court: No, this is conversation, this is all admissions that he made. We are not proving an actual fact of something done, we are proving a conversation which was had.

Mr. Jackson: Does he mean to say that that is what he told him?

[fol. 142] The Court: Yes.

The Witness: That is correct.

The Court: Try to put it in the form of "I said"—"He said" —to the best of your recollection. I know you cannot remember his exact words and his hesitations, indicated by periods, commas and exclamation points, but give us in your own language your best recollection of what you said to him and what he said to you.

A. (Continuing:) I asked him how long he was a member of the Party and when he joined. He stated that he was not a member for a period of two full years, because when he turned his card in there was on the reverse side of it several squares vacant. Those squares were for the purpose of pasting stamps there to indicate that dues had been paid for a particular month. The reason—Excuse me—I asked him if he was a fullfledged or a probationary member of the Nazi Party and he stated that he was what they call a probationary member —they have a word for it in German. I asked him about his membership number that appeared on his card. He stated he did not remember his membership number but that it was probably in the three million. I asked him then if he had not joined the Party prior to the less than two years he had told me he was a member. He stated that in 1937, it must have been the earlier part of 1936 or

1937, that he joined the Party because it was in the latter part of 1937 that he had an attack of tuberculosis. He then agreed that it was—he then said that he must have been a member of the Nazi Party either from the early part of 1936 or from the early part of 1937 until December of 1940.

Q. Now, was there any conversation as to how long he paid dues?

A. Yes; I asked him how long he had paid dues and he stated that he had paid dues on seven or eight occasions [fol. 143] during this period, the exact dates he did not remember.

Q. I see. Was there any conversation as to attending any functions of the Party?

A. Yes, I asked him and he stated that he had attended a function in September of 1939 following receipt of an invitation from Dr. Draeger to come to the Consulate.

Q. Was there any conversation as to attending a Party meeting in September of 1939?

A. Yes, he went to the—I don't know whether you would call it a Party meeting, but he went to the Consulate in September of 1939 to Dr. Draeger's office there; there were approximately 10 to 15 other persons that he assumed to be members of the Party present.

Mr. Gechtman: I object to that, your honor.

The Court: No, he said that there were certain people that he may have presumed to be members.

Q. Was there any conversation with the defendant as to what was said to the defendant by Draeger?

A. Yes; Dr. Draeger asked the persons present including Mr. Mayer, whether they desired to return to Germany. Mr. Mayer told me that the majority of the persons indicated by raising their hands that they desired to return to Germany.

Q. Was there any conversation at that particular time as to what Dr. Draeger said in connection with the Party?

A. Yes, Dr. Draeger told those—this, of course, is what Mr. Mayer told me—Dr. Draeger told those present they should continue to be loyal to the Party and to the Fuehrer, or some words to that effect. As a matter of fact, we had difficulty at that time—I attempted to get the exact words, but he couldn't give them to me.

[fol. 144] Q. Was there any conversation as to whether

the defendant had gone to the Consulate in December of 1940?

A. Yes, sir.

Q. What conversation took place?

A. He told me that in December of 1940 he went to the Consulate and talked to Hans Vogel; that he gave his membership card in the Party to Hans Vogel, and that he at that time was told by Hans Vogel that all of the aliens in this country had to register under the Alien Registration program; and he also instructed—this, of course, is Mr. Mayer telling me—he instructed Mr. Mayer as to how he should answer certain questions.

Q. What questions?

A. The questions 10 and 15 of the Alien Registration form.

Q. What did Mr. Mayer state Vogel told him as to how questions 10 and 15 should be answered?

A. First as to question 10, he stated that in answer to question 10—Would the Court want me to give that exactly from one of the forms?

The Court: Just give us what your recollection is of the conversation.

A. Yes, sir. He was told to answer this form.

Q. By whom?

A. By Vogel, he was told to answer this form which pertains to a membership in organizations in this country, that he was a member of the Reichdeutschevereinigung; he also stated that he had never heard of the Reichdeutschevereinigung prior to the time that Mr. Vogel told him that.

Q. Did he state whether he was ever a member of any such organization?

A. He was never a member of any such organization, he had never heard of it prior to that time.

Q. Was there any conversation by Vogel as to what he should say as to what this organization was?

[fol. 145] The Court: Well, if there was we shall hear it tomorrow morning. We will recess now until 10 o'clock tomorrow morning, ladies and gentlemen; meanwhile don't discuss this case with anyone and don't permit anyone to discuss it with you.

(Adjourned to Thursday, November 30, 1944, at 10 o'clock A. M.)

Newark, N. J., Thursday, November 30, 1944; 10 A. M.

[Case Continued]

(Appearances as before.)

The Court: I will ask counsel to assure me that the defendants are all present.

Mr. Pearse: Yes. they are all present.

ROBERT L. BELL resumed the stand.

Direct examination.

By Mr. Stanziale (Continued):

(Question repeated by the reporter.)

A. Mr. Mayer told me that Mr. Vogel told him if he were asked what the Reichsdeutschevereinigung was he was to say it was a welfare organization.

Q. Now, Mr. Bell, did you have any conversation with the defendant Mayer with particular reference to question number 10 on the Alien form?

A. Yes; I asked him whether or not he had received any [fol. 146] information or any instructions from Mr. Vogel as to how he should answer the question. He told me that Mr. Vogel had written out the answer to question 10 which he was to put on the 1940 Alien Registration form specifically, that he had written out Reichsdeutschevereinigung.

Q. Was there any conversation with Mr. Mayer with particular reference to question number 15 on the Alien form?

A. Yes, Mr. Mayer told me that Vogel had told him he should answer question 15, "Have not."

The Court: Just "Have not"?

The Witness: Yes, sir.

Q. Did you have any conversation with the defendant under what circumstances he first applied for membership in the Nazi Party?

A. Yes. After he had told me that he had joined the Party, I asked him what the circumstances were and he told me that there was a woman by the name of Marie Aubrey, who had formerly worked for the defendant, mostly as a domestic, and that she had invited him to come with her over to the Consulate and to join the Nazi Party.

He went with this Miss or Mrs. Aubrey over to the Consulate, where he met Von Wimmersberg. He understood at that time that Von Wimmersberg was head of the Party in this region, although later he was told that Dr. Draeger became the head of the Party in this region.

Q. Was there any conversation with the defendant as to whether he received invitations to Party functions after his first application was signed?

A. The only thing I can recollect in that respect is he told me he went to the Consulate on eight or ten occasions to pay the dues; that he did not attend any festivities prior to September of 1939. Now, I am not sure whether he was questionned about receiving invitations or not.

[fol. 147] Q. And what conversation was there, if any, with reference to attending Party functions after September, 1939?

A. Well, I asked him all of the festivities or occasions that he attended, and kind of meeting of the Party. He told me following the meeting with Dr. Draeger in September of 1939, he talked to Vogel over in the Consulate with particular reference as to how he should answer these questions. That was the only time after September, 1939, he told me, that he went to the Consulate.

Q. Was there any conversation as to who wrote the instructions out as to questions numbers 10 and 15?

A. He told me that Dr. Vogel gave him the answers in writing. I don't remember whether he stated that Vogel wrote them out or produced the answers already written out.

Q. Did you reduce the contents of your conversation with the defendant Mayer to a statement in writing?

A. Yes, I did.

Q. Will you tell us what you did?

A. Prior to the time that I reduced it to writing I asked Mr. Mayer why he had on November the 22d, told me that he had not been a member of the Party and also, why he had told me that he had never been to the Consulate, and he stated at that time that the reason he had not answered the question in the affirmative on the first day was that he had been told not to admit membership in the Nazi Party.

Q. Told by whom?

A. By Vogel.

Q. Then what did you do?

A. Following that, on November the 23d, I reduced the information that he had given to me in writing, asked him to read it and if it was true, asked him if he desired to sign it. He stated that he did, that it was true, and he did sign the statement.

Mr. Stanziale: I have no further questions to ask, your Honor.

[fol. 148] The Court: I have been robbed. Somebody took that list you gave me, Mr. Pearse.

Mr. Pearse: Well, if the Court please, I don't think any of us have any questions to ask this witness except Mr. Jackson.

Cross-examination.

By Mr. Jackson:

Q. If I may come around here, your Honor.

The Court: Yes, do please.

Mr. Jackson: I can hear better.

Q. Mr. Bell, as I understood you yesterday from where I sat, you examined Jacob Mayer, one of the defendants, on three succeeding days, commencing with September 22, 1943; is that correct?

A. No, sir, that is not quite correct.

Q. What is correct, please?

A. On two occasions, November 22 and 23.

Q. I understood you to say that was November and not September, right?

A. It is November the 22nd and 23d.

Q. I understood you to say that you examined him in his home, is that correct?

A. I questioned him at his home, yes.

Q. Well, what is the difference you make?

The Court: That was the first date, was it?

The Witness: Yes, sir.

The Court: And the second day was at Ellis Island?

The Witness: Was at Ellis Island.

The Court: When was the occasion at your office?

The Witness: On the 22d I questioned him at his home, then he was asked to come to the office, and on November 23d, at Ellis Island.

[fol. 149] Q. When was he asked to come to your office?

A. On November 22d.

Q. The same day that you examined him in the house?

A. On the same day that I questioned him at the house.

Q. Do you draw a distinction, Mr. Bell, between examining him and questioning him?

A. Well, I hardly know what connotation you give to examining.

The Court: No, but do you have any distinction, or do you use them synonymously?

The Witness: Well, not exactly synonymously, no, sir.

Q. Well, how do you use them, would you mind telling us?

The Court: What's the difference between questioning and examining in your system of terminology?

The Witness: Well, with respect to a defendant I have never used the term examining, I would rather—my own use of the word "examining" would be by visual examination or by something that would mean more to gather from a visual impression.

Q. I see. Well, then, what it was is you simply asked him questions and he told you things in answer, is that correct?

A. That is correct.

Q. And that is what you mean by this examination, if I use it that way?

A. That is correct.

Q. I understood you to say, however, that you also examined him at the office of the Federal Bureau of Investigation in New York on one of three days that I understood you to say?

A. It was the office of the Federal Bureau of Investigation at Newark, Mr. Jackson; it was on two days.

[fol. 150] Q. And then you took him to Ellis Island afterward?

A. That is correct, sir.

Q. Well, was that the third time you questioned him?

A. There were only two occasions, sir.

Q. Were there two in one day?

The Court: Let's get this straight. You spoke to him at his home?

The Witness: That is correct.

The Court: Then he went with you to the FBI office on the same day?

The Witness: That is correct.

The Court: You spoke to him there.

The Witness: Yes.

The Court: And on the following day you spoke to him at Ellis Island?

The Witness: That is correct.

Q. There were three examinations in two days?

A. That is correct, sir.

Q. How long have you been connected with the Federal Bureau of Investigation as an agent or investigator?

A. Since August of 1942.

Q. You have examined, I take it, a great many cases since that time, prospective defendants?

A. Yes, I think you would consider it a considerable number.

Q. How many would you say you have examined since you joined the organization?

The Court: Well, that might be very interesting as a matter of information, but how is it material? Any examinations made since that time certainly would not be material. How much experience had you had in examinations before you examined this man?

[fol. 151] The Witness: Well, I have questioned—I could give only an estimate.

The Court: Give us an estimate.

The Witness: Probably 100 potential defendants.

The Court: Before you questioned him?

The Witness: That is correct, sir.

Q. And have you also examined the other defendants that are named in this indictment here?

Mr. Stanziale: Objected to, not proper cross examination.

The Court: I will allow it. Have you?

The Witness: I should like to have the names of the defendants read off, I have not been present in court.

Q. Well, suppose I bring that to your attention after a few minutes.

A. All right, sir.

Q. And I will ask you this question. Did you go to Mr. Mayer's home or his place of business to question him on the 22nd of November?

A. To his residence.

Q. To his residence?
A. Yes, sir.
Q. And that was at Hasbrouck Heights, was it not?
A. That is correct, sir.
Q. And did you go alone?
A. No, sir.
Q. You had someone with you?
A. That is correct, sir.
Q. And when you got there did you see Mr. Mayer alone?
A. No.
Q. Or did you talk to him in the presence of anybody—in the presence of the man that was with you perhaps?
A. The man that was with me, his wife and his daughter and his young son.
Q. Did he have a lawyer?
A. There was none present.
Q. I mean was there a lawyer, an attorney present for him?
A. No, sir.
[fol. 152] Q. Did you caution him before you asked him any questions about his rights, that anything he might say might be used against him?
A. Yes, sir.
Q. You told him that, did you?
A. May I ask you to repeat that?

(Question repeated by the reporter.)

A. The answer I gave is not quite correct. I asked him certain questions about his personal background, his marital status and when he entered the United States, and questions relating to that. At the time I cautioned him that anything he might say might be used against him.

The Court: But you did caution him?
The Witness: I did caution him later.
The Court: Did you caution him before you questioned him as to any association with the Nazi Party?
The Witness: I asked him a few questions first, then I cautioned him that anything he said might be used against him.

Q. Did you mentioned the fact that he had or had not a right to have a lawyer?
A. The question never came up, Mr. Jackson.
Q. And you didn't bring it up?

A. No, sir.

Q. How long did you stay at the house; what time did you go there?

A. I believe we arrived there about eight o'clock in the morning; however, Mr. Mayer was not there at that time.

Q. He was down at his place of business, you mean?

A. Well, I was informed that he was at the dentist's.

Q. And then about what time did you leave?

A. We left shortly before or around noon.

Q. Did you take him with you to New York that day?

A. We took him with us to Newark.

[fol. 153] Q. Oh, you had your examination, the second examination or questioning in Newark?

A. That is correct, sir; in the office of the Federal Bureau of Investigation.

Q. And then was he released to go back home?

A. No, sir.

Q. What did you do with him then?

A. After we had questioned him, there was a representative of the office of the United States Attorney at our office. We asked the Assistant United States Attorney whether the facts developed in the course of our investigation—whether he desired to take any action, and he stated that he wished to communicate with Washington to see whether or not Mr. Mayer should be apprehended as a dangerous alien enemy. Later, he instructed us to deliver him to the custody of the Immigration Service at Ellis Island, which we did on the night of the 22d.

Q. Did he impress you as a dangerous person?

A. I didn't form an opinion of it, sir, that is not my——

Q. Isn't that part of your business to form opinions after you examine people?

The Court: I am afraid it is not material what his opinion was, he is not being tried on this man's opinion.

Q. Did you say anything to him before you cautioned him as to testifying; in other words as to testifying, in other words, or substantially to this effect: that you had rounded up—that he was the last of the people, these people that were mentioned in this indictment, and that all the others had been rounded up and had been examined and questioned, and that they had told everything and that he might as well do the same? Did you in substance or words make any such statement as that?

A. That is not correct, not quite correct.

[fol. 154] Q. Is it substantially correct?

The Court: What did you say?

The Witness: I told him that I had interviewed other persons whose name appeared on the list; that this person I had interviewed had admitted that he was a member of the Party.

Q. How many persons did you interview?

A. I had interviewed one previously. I also told him the experience that he had had in New York was that the persons on the list had admitted that they were members of the Party after some questioning.

Q. And did you tell then anything more along the lines as I say?

A. I said nothing about they had been rounded up, no, sir.

Q. You didn't mention that at all?

A. I didn't use the term "Rounded up" at all.

Q. Did you tell Mr. Mayer what you just now testified you said to him before you cautioned him; was that one of your preliminary questions?

A. The——

Q. Can you answer that just yes or no?

A. Well, may I get——

Q. Will you repeat the question?

The Court: The sense of the question as I gather it is this: Did you warn Mr. Mayer of the fact that you were an FBI agent and that you were going to take a statement and that it would be used against him before you told him about having had any other statement or before you told him it was the usual course for these people to tell that they were members?

The Witness: I warned him first.

[fol. 155] Q. I got the impression and I get it now, Mr. Bell, that you are testifying or talking from memory; is that correct?

A. That is correct.

Q. Have you refreshed your recollection from any memorandum or any notes that you made?

A. That is correct, I have.

Q. Do you have those with you?

A. No, sir.

Q. Will you bring them?

Mr. Stanziale: I have them here.

The Court: You have them?

The Witness: Yes.

The Court: May I see them?

Mr. Stanziale: Yes, a statement, shall we mark it in evidence?

The Court: No.

Mr. Jackson: No, we will take care of that.

Q. Did you take your notes on the typewriter when you were questioning him?

A. No, sir, no, sir.

Q. Did you take them in shorthand?

A. No, sir; I do not use shorthand.

Q. Did you simply make memorandums for your own account?

A. That is correct, sir.

Q. Then anything that was put on the typewriter was after you had taken those notes; is that right?

A. That is correct, sir.

Q. And that was a fill-in, wasn't it?

The Court: Well, that is a denomination which may mean one thing to you and another to me and another to the witness, so please don't use it.

Mr. Jackson: Well, just pass that for the moment.

Q. Do you remember him telling you that he was not a member of the Nazi Party?

A. Yes, sir.

[fol. 156] Q. Did you make a memorandum of that?

A. No, sir.

Q. So that your recollection is purely one from memory, is it?

A. Largely one from memory.

Q. You said yesterday, as I recall it, that Mr. Mayer told you he had attended a meeting; is that the substance of it?

A. Mr. Mayer told me that he attended a meeting over at the Consulate in 1939 before Dr. Draeger.

Q. Well, but was that the type of meeting that you had in your mind when you said that he had attended one of these functions or one of these meetings?

A. I think, sir, that I did not say that he attended one of these functions, I think I stated that he was called to

the Consulate by Mr. Vogel—I beg your pardon—by Dr. Draeger; that there were 10 or 15 or 20 other persons present, and then went on to testify as to what transpired at that meeting.

Q. He went on to testify?

A. No, I went on to testify as to what he had told me transpired at that meeting.

Q. Yes, and did you keep a record of your notes with respect to that part of the conversation?

A. I kept a record of my notes until such time as I dictated a report in the usual course of our work, at which time I destroyed the notes.

Q. You do not have those notes now?

A. No, sir, I do not. The only thing——

Q. Go on, please.

A. The only thing that was made at the time was a statement, if that statement still exists the notes have been destroyed.

Q. The notes that you made have been destroyed?

A. That's right, sir.

Q. Now, do you want to leave this impression that Mr. Mayer never told you in answer to any inquiry you made that he ever attended any meeting of the Nazi Party, any gathering or function, any one of those many things that [fol. 157] were brought out before the Court and jury yesterday or the day before—do you mean that is the type of meeting when you say that he told you he attended a meeting?

Mr. Stanziale: I object.

The Court: No, he has said that the meeting he referred to was a meeting which had been called by Dr. Draeger at the Consulate, at which there were 10 or 15 or 20 other people present. The invitations, which speak for themselves, were not at the Consulate and were public gatherings.

Q. Well, did you testify yesterday that Mr. Mayer told you he ever attended any other gathering of these people except in connection with this date of September—was it in 1939?

A. It was this attendance at the Consulate in September 1939, before Dr. Draeger.

Q. All right.

A. And then also he went to talk to Mr. Vogel in December of 1940.

Q. Aside from those——

A. None other.

Q. He never told you that he attended any meetings?

A. No, sir.

Q. Did you ask him?

A. I believe I stated a few minutes ago that he told me that he had been to the Consulate on several occasions; I do not remember what his answer——

The Court: No, I think what counsel has in mind was public gatherings under the auspices of the Consulate.

The Witness: He did not tell me that he had attended any of those meetings. I don't remember the extent to which he was questioned along that line.

Q. You are still now calling on your memory there, are you not?

A. That's right, sir.

[fol. 158] Q. But anyway, when you speak of these meetings that you spoke of yesterday and speak of now, you refer only to the September,—the time in September, 1939 when Mr. Mayer went to the Consulate at the request or from a letter, is it—did he tell you?

A. He told me that he was called to the Consulate.

Q. All right, he was called to the Consulate and he went there?

A. That's right.

Q. That was one time.

A. That's right, sir.

Q. And he was called again to the Consulate in December of 1940?

A. I did not state that, sir; I don't recall that he told me that he was called to the Consulate in December of 1940, he just told me he went to the Consulate.

Q. He went to the Consulate?

A. That's right, sir.

Q. Whatever brought him there he didn't tell you. [redacted] those are the two times that he mentioned to you that he had gone to the Consulate plus what you further said that you have a recollection that he may have gone there other times, but in any event he never told you, did he, that he attended any of these picnics or dances, or went to the

theatre or to the moving pictures or wherever these great gatherings were, did he?

A. There is a difference between going to the Consulate and to the parties.

The Court: No, did he ever tell you he went to any of the Nazi parties?

The Witness: He never went to any of the festivities, but he did go to the Consulate on other occasions.

Q. He told you that?

A. Yes, sir, to pay his dues.

Q. Well, it was perfectly all right for him to go, wasn't it?

Mr. Stanziale: I object.

The Court: Objection sustained, it is immeterial.

[fol. 159] Q. So, if you left the impression yesterday that he attended any of these various functions that were brought to the attention of the Court and jury, you did not mean to leave that impression; is that correct?

Mr. Stanziale: I object.

The Court: There is no reason why such an impression should have been left.

Mr. Jackson: Well, your Honor, I got the impression.

The Court: Well, maybe you got the impression, but the jury I am sure will remember the testimony and if there were any doubt about it it has now been corrected.

Q. Did you yourself in connection with your work, attend any of these functions that we are speaking of?

Mr. Stanziale: Objected to as immaterial.

The Court: Well, did you?

The Witness: No, sir.

Q. Isn't it the custom of the Federal Bureau——

The Court: Well, whatever the custom is he didn't do it.

Q. Did you ever mention anything to Mr. Mayer about a moving picture which you had in your possession or had seen?

A. I don't recall mentioning anything to him.

Q. Did you ever tell him that you saw his picture in the moving picture of some organization that had been taken?

A. No, sir. I, however, exhibited to him a photograph of the person that to me looked a lot like Mr. Mayer. It was not a moving picture, it was a still photograph. I questioned Mr. Mayer as to whether that was his picture.

[fol. 160] Q. And where had you obtained that picture or where was that taken?

A. As to where the picture was obtained I am not in a position to state. It was among the information in the office; I do not know who obtained it; I was informed that it was a picture taken of the Hitler Birthday party held in, I believe 1942, on the—no, I beg your pardon, in nineteen—I don't recall the date exactly, but it was a Hitler Birthday party of members of the Nazi Party in New York. I asked him if his picture—if one of the men in the back was his picture, it resembled him considerably.

Q. And what did he say?

A. He denied it, he stated it was not.

Q. Well, he simply said "No," didn't he?

A. That's right, sir.

Q. Now, on this meeting that you say he attended, or went to at the office of the Consulate in 1939, do you have any notes at all on that meeting, that you took?

A. Of the conversation with Mr. Mayer or of the meeting itself?

Q. Of the conversation, as to that meeting with Mr. Mayer.

A. Nothing except the statement, sir.

Q. And how long after you had taken those notes did you make up a statement?

A. The statement was made up in Mr. Mayer's presence on the same date.

Q. At his house?

A. No, at Ellis Island. As a matter of fact, he signed the statement.

Q. You mean over at Ellis Island; that would be on the next day?

A. That would be on November the 23d.

Q. And what did you say to him and what did he say to you with respect to this September, 1939, visit to the Consulate?

A. I asked him what meetings he had attended; he told me that he had been called to the Consulate in September of 1939; that there were present 10 or 15 or possibly 20 other

individuals; that Dr. Draeger addressed these persons, that he asked them whether any of them desired to return [fol. 161] to Germany; that most of the others, not including Mr. Mayer, indicated that they did desire to return to Germany, and also that Dr. Draeger told those present something to the effect that—he was not able to give me the exact words—that the members of the Party should remain loyal to Germany and the Fuehrer. He also told me that Dr. Draeger told those present that they could become a member of the Nazi Party in this country even though they became citizens of the United States.

Q. Well, did he tell you that he was in with these several people that were there; did he tell you that?

A. Yes, sir, he was among the group.

Q. That he went in with this group?

A. That is correct, sir.

Q. Did he tell you that he said anything about not intending to go back to Germany?

A. He stated only that when the others indicated that they wanted to return to Germany he was not among those who expressed a desire to return to Germany.

Q. Is that the way he put it do you suppose? Do you think that's the way he put it?

A. No, sir, it was——

Q. How did he put it?

A. It was in response to a direct question, I asked him if he indicated he wanted to return to Germany and he said he did not.

Q. You know that Mrs. Mayer was questioned too, do you not.

A. Yes, sir.

Mr. Stanziale: Objected to, she is not indicted.

The Court: Well, he has answered it.

Mr. Stanziale: He hasn't answered it yet.

The Court: He said yes.

Mr. Stanziale: Very well.

Q. Were you there and questioned her?

A. Yes, sir.

Q. And do you recall that she said in substance——

The Court: Well, just a moment. How is that material what she said?

[fol. 162] Mr. Jackson: It is material, your Honor, because Mayer never affiliated with the Nazi Party. All he went there for——

The Court: Are you going to prove that by what his wife said?

Mr. Jackson: I can prove that by what his wife and what he himself said.

The Court: What he said, yes. You may ask him.

Mr. Jackson: But I am only mentioning it now because Mayer did not mention all of this to Mr. Bell when he talked to him in his home.

The Court: Well, that is unfortunate but it doesn't——

Mr. Jackson: But Mr. Bell knows——

The Court: It doesn't make Mrs. Mayer's statement of any probative value so far as this man is concerned.

Mr. Jackson: It will have, however, probative value so far as the facts are concerned, because she herself went to the Consulate in connection with this very matter.

The Court: Well, if you desire to call her as a witness you may do so.

Mr. Jackson: Well, I will eventually.

The Court: I won't hear it indirectly.

Mr. Jackson: I will, your Honor, later.

Q. Didn't Mayer tell you at this occasion when he went down in 1939, that he left the meeting?

A. No, sir.

Q. Did you ask him anything about that?

A. No, sir.

Q. Did he tell you when you talked to him at his home that his wife's father had died in Germany in 1935?

A. I don't recall that, sir.

Q. Or that he was trying, through the help of the German Consulate, in the early part of 1936, to arrange if pos-[fol. 163] sible to get some money from that estate for his wife?

A. He mentioned something about an effort to get in the estate; that, however, was on November 22, when he told me that he had visited the Consul and asked him what the purpose was, and he mentioned something about an estate there; however, on the next date when he told me that he had joined the Nazi Party he stated nothing further about the estate.

Q. But you knew something about it in any event?

A. I only know that he mentioned it in passing, yes.

Q. Now, you are familiar with the formality, are you not, to a certain degree, with the Nazi Party's procedure here in New York?

A. I am not an expert on it, sir.

Q. No, I am not either, I didn't think either of us were; but there has been a good deal of testimony,—have you been here to listen to some of the testimony?

A. I arrived at approximately noon yesterday; I wasn't present Monday or Tuesday.

Q. Well, there was testimony to the effect that you became a full member of the Nazi Party only after a lapse of time at which occasion they gave you a book which is in evidence or is for identification here, a red book. Now, when you first questioned him on November the 22d, and as I understand you to say he said he was not a member of the Nazi Party, that was what he told you, was it?

A. That's right, sir.

Q. Then was it the same day at the same time you talked to him or the next day that he mentioned to you about never having been identified as a member from Germany?

Mr. Stanziale: I object to that, I don't follow it, sir.

Mr. Jackson: You may not follow it——

[fol. 164] Mr. Stanziale: Please, Mr. Jackson, may I make an objection?

The Court: The objection is that you don't follow it. See if you can clarify the question or simplify it rather.

Q. What did he say to you afterwards, having first told you he was not a member of the Nazi Party, you say, then afterwards he said he was, what kind of a member, if you remember?

A. As I recall it, he did not know what kind of a member he was, he merely told me of the identification card he had received, how long he had paid dues, but he did not state whether he was an anwaerter or probationary member or a fullfledged member.

Q. I think you testified yesterday that he told you he was a probationary member?

A. The question came up during the course of how long he had been a member or how long he had paid dues as to—he was never able to tell me definitely whether or not he was a probationary member or a fullfledged mem-

ber. The testimony of yesterday concerned the length of time—and at the time I was questioning him also—the length of time that he had been associated with the Nazi Party. We were trying to arrive at an answer to that question. He told me that the reverse side of his identification card had 24 squares in it but was not completely filled out with the dues stamp for each month. Therefore he thought he had belonged less than two years. Later, however, he stated that he joined prior to the time that he had an attack of tuberculosis, which attack of tuberculosis occurred in 1937; consequently he must have joined it in 1936 or 1937. As to whether or not he was a fullfledged or probationary member if he knew exactly he did not tell me. I might add there that he was rather inclined to think that he was not a fullfledged member.

[fol. 165] Q. I took down, but probably incorrectly,——

The Court: Oh, I hope not.

Q. (Continuing)—from what you said yesterday that you definitely said that he told you that he was a probationary member; is that incorrect?

A. May we refer to the record, sir?

The Court: No, just tell us now.

Q. It is not sufficiently important to us anyway.

The Court: Do you remember what he told you?

The Witness: Yes, sir, I tried to elaborate that just now as to the whole thing that he told me.

The Court: That is what he told you?

The Witness: That's right, sir.

The Court: You don't recall anything except that; in other words, he wasn't sure himself of the type member he was?

The Witness: That is correct, sir. If he was he didn't tell me that he was sure.

Q. Now, in the December meeting that he had at the Consulate or the visit which he made there in December, 1940, I think yesterday that you testified that he turned over his card to Mr. Vogel; is that correct?

A. That's right, sir, in December of 1940 is what he told me.

Q. Yes, but did he tell you that he surrendered anything to Vogel, are you sure?

A. Yes, sir.

Q. Did you take a memorandum of that definitely?

A. I believe it is in the statement, sir.

Q. I know, but I am asking you if you made a memorandum of that definitely that he said he turned that over to Vogel, or did he say that he turned it in?

[fol. 166] Mr. Stanziale: What's the difference?

Mr. Jackson: Well, there is a lot of difference in my opinion.

The Court: All right.

A. I don't recall any distinction in what he told me. As I remember it, he told me he merely talked to Vogel. If he made a distinction of time as to whether he turned the card in to Vogel or to some one else, I don't recall it. The only thing I recall him telling me was he talked to Vogel and he turned the card in. I don't remember his stating he talked to any one else or gave any one else the card.

Q. So that what he did with the card other than that he said he turned it in, you do not recall any testimony, do you, anything he said?

A. No, sir.

Q. Did you testify—I have no memorandum on that, but did you testify definitely as to this Miss Aubrey this morning?

A. Yes, sir.

Q. When was it that Mayer made any statement to you about Miss Aubrey?

A. On November the 23d, sir.

Q. And what did he say to you about that,—what did you say to him first and what did he say to you?

A. I asked him through what—how it was that he happened to join, who it was that was his sponsor, who it was that extended him the invitation and he mentioned Miss Aubrey, stated that she had invited him to go over to the Consulate, that he had gone over and met Von Wimmersberg at the Consulate and subsequently joined. He told me also that he did not know Miss Aubrey's present whereabouts, that he had not seen her for some time.

Q. Is that all he said about her, do you remember?

A. No, sir; he also stated that his wife did not like Miss Aubrey, that she was against his joining the Party, Mrs.

[fol. 167] Mayer was not in favor of Mr. Mayer's joining the Party. There was also some later difficulty between Mrs. Mayer and Miss Aubrey, the nature of which I do not recollect, if I obtained full details at that time. I think it was not gone into.

Q. That is all Mr. Mayer told you about this?

Mr. Stanziale: I object, we are not interested in the marital difficulties between Mrs. Mayer and Miss Aubrey.

The Court: All the information he got he got from Mayer himself, is that so?

The Witness: All that I have testified to. I did ask Mrs. Mayer about it.

The Court: I mean all that you testified about.

The Witness: That's right.

Q. This information that you last testified about, did you get that from Mr. Mayer or from Mrs. Mayer?

A. From Mr. Mayer.

Q. And did he also at that time mention about the estate in Germany?

Mr. Stanziale: He has already testified, Judge Meaney.

The Court: I am asking if it was on that occasion.

A. The estate in Germany was mentioned on November 22d. All of his statements about activity or membership in the Nazi Party or meeting was on November the 23d.

Q. That is, after you took him over to—that is down in Newark or over in Ellis Island?

A. November the 22d was the first at his home, then at the office in Newark. November the 23d was on Ellis Island.

Q. And that is where all of these questions you have been speaking about, the meetings and so forth, were asked; [fol. 168] is that correct?

A. No, there were questions asked here also, but his statements that he was a member, that he did attend, that he did go over in September, 1939 for information, that he told me about the Nazi Party, was all made on November the 23d at Ellis Island.

Q. Now, when you said the meetings he did attend, is that something that he said to you?

A. No, sir, I am merely summarizing there.

Q. And then this conversation that occurred about Miss Aubrey was on November the 22d?

A. No, the conversation about Miss Aubrey was on November the 23d.

Q. That was also on November the 23d?

A. That's right, sir; but he mentioned something about Miss Aubrey on November the 22d; it was nothing in connection with his membership in this organization though.

Q. Was there any connection in what he mentioned there about the estate that was coming to Mrs. Mayer from Germany?

A. I don't recall whether Miss Aubrey's name was mentioned in connection with the estate or not; I only recall that both things were mentioned.

Q. You have not yourself, have you in your investigation, found that Mr. Mayer has been connected with anything that was inimical to the United States, have you?

Mr. Stanziale: I object, if your Honor please.

The Court: I should think that if he were connected with the Nazi Party that might be construed as an association likely to be hostile to the United States.

Q. But I am asking you if you know of——?

The Court: Of any other?

Q. (Continuing:) —if you know of any activity of his that is inimical to the United States, do you?

[fol. 169] Mr. Stanziale: I object, your Honor please; there is evidence of his membership on G-17 for Identification.

The Court: What is your purpose in asking the question, to make him a character witness for him?

Q. May I show you this list of persons whose names appear on this list and ask you if you will indicate those whom you personally examined or questioned.

Mr. Stanziale: I object as immaterial, your Honor, if he examined anyone else?

The Court: I will allow it.

A. I have conducted investigation but never interviewed or questioned Ludwig Koenig.

Mr. Pearse: Well, Judge, I wish to interpose an objection at this time, if the Court please; I don't know whether this gentleman has interviewed any of the defendants whom

I represent, but I don't see how it is material whether or not he interviewed other defendants, I think it might be prejudicial to some of the other defendants.

The Court: How do you feel it is material?

Mr. Jackson: I wanted to ask if in connection with his examination of any one or more of the defendants anything came up with respect to the defendant Mayer.

The Court: Well, how would that be material in so far as the questioning of Mayer is concerned?

Mr. Jackson: I wanted to know and to bring out if I might, whether or not any of the people that are mentioned are connected or acquainted with Mayer. I can ask Mayer if he is acquainted with them, but I wondered if you had found out anything.

[fol. 170] The Court: I don't think that is material.

Mr. Jackson: Very well, your Honor, I won't press that.

Mr. Cole: Your Honor, may I ask that the one line that was read be stricken from the record, inasmuch as it has been denied, the one line read by the witness?

The Court: What line do you refer to?

Mr. Cole: I would not like to have it repeated, but I would be very glad to talk to your Honor about it. May I have that?

The Witness: I was merely calling a name off that list.

Mr. Jackson: This is what I handed to him.

The Court: If there was a response to it strike it from the record.

Mr. Cole: That one line; thank you, sir.

Q. At the time that Mayer was being examined by you on—that would be the 23d of November—what did you observe as to his physical condition? I think he testified on that line yesterday.

Mr. Stanziale: I object. We are trying this man for an offense which is in the indictment and his physical condition——

The Court: Except as it might have some effect on the admissibility of the statement.

Mr. Stanziale: If it is as to that I withdraw my objection.

The Court: You may answer the question.

A. His physical condition on November the 23d, as far as I can remember, resembled very much what his physical condition is today. He was thin. Also on November the

[fol. 171] 23d, I don't know whether you consider it his physical condition or not, when we started interviewing him there were—after we had interviewed him only a matter of a few minutes, resumed the interview on November 23d, the beads of perspiration on his forehead, you could see his adam's apple moving up and down, see the muscles in his neck twitching. Then when he finally stated, "I might as well tell you all," he kind of slumped down in his chair and was very relaxed. Now, I don't know whether that physical condition—I didn't pay particular notice to his physical condition except that he appeared to be thin, he appeared to be somewhat nervous at the time. That is about the only recollection I have of his physical condition.

Q. On the 22d of November you examined him first at his home and then in Newark, is that right?

A. That is correct, sir.

Q. Altogether how many hours of examination do you think he had that day, or was it at night?

A. It was not by night, sir; the majority of the morning on November 22d was taking up in searching his residence. We questioned him on the afternoon of November the 22d until 5.00 to 5.30 P. M. beginning probably about one o'clock, I should say four or five hours of questioning there. On November the 23d he was questioned probably but two or three hours. However, that was mostly in obtaining details. It was only after we had questioned him a matter of a very few minutes that he told us he was a member of the Nazi Party.

Q. Just a second. When you mentioned the 22d didn't you also take him to Newark that day?

A. That's right, that is where most of the questioning was done.

Q. Most of the questioning was done in Newark and not at the house?

A. That's right, very little questioning was done at his house except obtaining information about his personal background, also a few questions were asked Mrs. Mayer along that line.

[fol. 172] Q. Well, at this examination which you gave him then in Newark there was no lawyer, was there, present for him?

A. No, sir.

Q. Did you at that examination also caution him about his answer and how he might incriminate himself?

Mr. Stanziale: Haven't we gone into this, your Honor, two or three times?

The Court: No, go on and answer.

A. He was cautioned on November the 22d, some time during the time that we left his residence on the way in to the office in Newark, that his answers might be used against him.

Q. Well, go ahead.

A. Is there a further part of your question unanswered?

Q. Well, had you cautioned him at his house before you started with him to Newark?

A. No, sir.

Q. You never cautioned him at his house?

A. No, sir.

Q. And you only cautioned him as to his right, on the way to Newark when you were taking him from the house to the second examination, is that correct?

A. Some time between the time that he left his house and the time that we resumed the questioning at the office. I don't recall the exact time. We had lunch somewhere en route. There was also, of course, a little automobile ride. I don't recall the exact point; perhaps it was at lunch, perhaps it was from his house to the point where we had lunch together; perhaps it was from the point where we had lunch together to the office or perhaps it was after we got to the office.

Q. You didn't happen to stop at his bakery for lunch, did you?

A. No, sir.

Q. When you went to Ellis Island was there again the caution given to him before he was questioned?

A. On November the 23d?

[fol. 173] Q. Yes.

A. The only occasion it was repeated was at the time he signed the statement; it was not repeated to him orally prior to that time.

Q. But he had been examined orally before you had cautioned him, had he?

A. I had cautioned him the day before, sir.

Q. I didn't hear you.

A. I had cautioned him the day before, sir.

Q. Yes, you had cautioned him, you say, on the way to Newark, or some place like that, as you went from the house.

The Court: You went through that pretty well. Now, I really don't see the necessity for stressing it further.

Mr. Jackson: I will only get this answer, your Honor, and then I am quitting.

The Court: All right.

Q. I ask you again, did you examine him in Ellis Island on the 23rd before or after he was cautioned as to his right, at Ellis Island?

A. To clarify that, sir, he was cautioned on November the 22d; he was questioned on November the 23d at Ellis Island; there was not another caution on that date until the time when he signed the statement.

Q. I see. All right.

Re-direct examination.

By Mr. Stanziale:

Q. What, if anything, did you say to him before the statement was signed?

Mr. Jackson: I think that has already been put down on the record.

The Court: Was there a separate warning immediately before the statement was signed?

The Witness: Yes, sir.

The Court: What was that warning?

[fol. 174] A. I told him, and it is also incorporated in the statement, that he need to make no statements or admissions to me or did not even need to talk to me, that I was a Federal officer, that anything he said might be used against him.

Q. But he signed the statement?

A. That's right, sir.

Q. Initialed each page?

A. That's right, sir.

Q. Statement signed in your presence?

A. That is correct, sir.

Re-cross-examination.

By Mr. Jackson:

Q. And did you make——

Mr. Stanziale: Would you mind if I finished my examination?

The Court: Just a minute, Mr. Stanziale hasn't finished with his redirect.

Mr. Stanziale: Mark this exhibit for identification.

(Exhibit referred to on previous page marked Exhibit G-56 for Identification.)

By Mr. Stanziale:

Q. I show you statement marked Exhibit G-56 for Identification and ask if you recognize the statement?

A. Yes, sir, that is my signature on the last page.

Q. Whose signature appears thereon as having executed the statement?

A. Jacob Mayer.

Q. And the date of the statement is November——

Mr. Pearse: I didn't hear what Mr. Stanziale said.

Mr. Stanziale: The date of the——

The Court: He is being so polite now that he really only murmurs.

Mr. Stanziale: I decided I am not going to have any more sallies with Mr. Pearse.

[fol. 175] A. The statement is dated November 23d, 1943.

Q. Is that the statement you referred to under questioning of Mr. Jackson?

A. That is correct.

Q. The statement was initialed on each page by the defendant in your presence?

A. That is correct, sir.

Q. And freely signed by him?

A. That is correct, sir.

Mr. Stanziale: I offer the statement in evidence.

Mr. Jackson: I object, sir, I haven't had time to look it over. May I look it over? Will you go on to something else?

The Court: Yes, the offer is made and its admission is objected to. We will suspend the ruling until counsel has had an opportunity to examine the statement.

Q. All right, Mr. Bell. Thank you.

The Court: Any examination by any other counsel?

Mr. Pearse: I think not.

Cross-examination.

By Mr. Campbell:

Q. May I ask one question which is, Is there any reference in that statement to any of the other defendants?

The Court: You might look it over.

Mr. Stanziale: There is no reference in that statement to any of the other defendants.

The Court: If there is I will take care of it. Call your next witness: I think probably before this witness starts we will recess for five minutes.

(After a short recess the proceedings were resumed in presence of the jury.)

[fol. 176] MOTION TO STRIKE TESTIMONY

Mr. Jackson: Your Honor, may I revert back to the witness who has just left the stand and to his testimony. I think I am entitled to move properly to strike out all of the witness's, Mr. Bell's testimony, on the ground that this defendant was examined prior to an arraignment. I also ask that this purported statement not be allowed in evidence, because it is admittedly a statement that has been made up after the defendant was examined and necessarily, as I expressed it before, a fill-in to make it a consecutive narrative, and because it does not contain anything like the information which was given by the witness in cross-examination; so that it is too misleading under the circumstances, and I think that the defendant could not be bound by it. And I think that it is not entitled to go into the evidence anyway under the circumstances.

The Court: Do you mean that the statement itself contradicts the testimony which was given by the witness Bell as to his oral conversations with——

Mr. Jackson: I don't mean, your Honor, contradictions so much as I mean omissions. Now, there is a great deal

of testimony which Mr. Bell gave on the stand this morning that is not here whatsoever.

The Court: But it is in the evidence before the jury.

Mr. Jackson: It is in the evidence before the jury and for that reason, sir, and because this was made subsequently and cannot be an accurate record under the circumstances I think it should not be put in evidence; I therefore ask that it not be——

The Court: But a written statement may very well be admitted even though it does not contain everything that was said, provided the person who makes the written state-
[fol. 177] ment signs it and admits that the contents of it are true. There is nothing inherently contradictory about admitting both a verbal and a written statement. One may be more inclusive than the other, but they are not mutually exclusive so far as admissibility is concerned.

Mr. Jackson: Well, what I object to particularly, your Honor, is that this is merely a conception of the witness after the fact, after his examination, and it does not therefore properly represent what actually transpired and omits material things.

The Court: But if the defendant himself said it is, who are we to say that it isn't?

Mr. Jackson: Your Honor, I need not argue that point with you, I am sure, to impress it upon you, but I contend that the defendant is not to be bound by at least some of the things that are in here which I know from the testimony there were not correct and should not be bound under the state in which he was and under the high pressure under which he was put.

The Court: If your objection is based upon the fact that the statement was not voluntary, that is a different matter. I shall rule now that if they were voluntary, both the oral and written statements are admissible. Now, as to the question as to whether or not they were voluntary, which would certainly affect their admissibility, I shall hear you.

Mr. Jackson: I am sorry, sir. Did you say voluntary?

The Court: Not on the question of whether one is exclusive of the other, because I have ruled they are both admissible, if they are both voluntary. Now I will hear you on whether or not you think the statements both oral and written, were voluntary.

[fol. 178] You have indicated that the basis of your objection is the basis set forth in the case of McNab, that the

man before he had made the statements had not been arraigned. That is definitely the basis of the objection?

Mr. Jackson: Yes.

The Court: What have you to say to that, Mr. Stanziale?

Mr. Stanziale: I don't think the McNab case has any application, for the reason that this defendant was taken in by virtue not of a complaint in the regular sense of a criminal complaint where he could be arraigned before a commissioner or a judge or anything, but by virtue of a Presidential proclamation relating to dangerous aliens, and therefore under the proclamation of the President, which was proclaimed on December the 8th, 1941, the President delegated to the Attorney General of the United States the power to execute regulations regarding the conduct of aliens. Now, in this particular case when the alien was taken into custody by the FBI Agents there was no particular judge or magistrate to arraign him before other than the fact—and no particular charge.

The Court: Certainly not the instant charge.

Mr. Jackson: Your Honor, there is one element in this case that does not come into the picture and that is as the witness himself stated Mr. Mayer was in custody at the time he was examined.

The Court: Well, that doesn't of itself invalidate any statement or admission that might be made. The Supreme Court has gone to extreme lengths to incorporate its ideas of the protection of the rights of individuals. I am not inclined to carry that idea any further than the Supreme [fol. 179] Court has. I believe that this defendant Mayer was not at the time he made the statement under such compulsion or such fear as would lead him to make a statementt because of that fear. He had been apprehended, not on the charge which he is now facing, but because he was an alien enemy and within the limits of the authority prescribed by Congress, the President had issued a proclamation and deputed his authority to his Attorney General, to apprehend people who were believed to be hostile to and a danger to the United States of America. In the course of the fulfillment of that duty the Attorney General caused the apprehension of Mayer and Mayer was so apprehended. At that time there was no charge for which he might be brought before a committing magistrate. The instant indictment was not brought until some time later, and he was

not under arrest for violation of that Act specifically; he was in custody, not in jail, but in a place of segregation denominated by the properly constituted authority, and therefore I will hold that the findings of the McNab case are not applicable. I think that he was very well aware of his rights and he was apprized of them by the investigating agent, and I find as a matter of fact that the admissions and statements were voluntary and made with full appreciation of his right. I shall therefore overrule your objection and admit them in evidence. You may have an exception.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Jackson: Your Honor, I am specifically referring to this, asking that this may not be allowed in evidence. You are ruling on the motion to strike out the testimony, [fol. 180] but I do ask you not to allow this in evidence because he was under duress and it is admitted that he was in bad physical condition, probably mental condition by this time.

The Court: I have ruled, sir, that I believe that the written statement was voluntarily made and I have accorded you an exception.

Mr. Jackson: Do I understand, your Honor, that the testimony on the witness stand by the agent, who compiled this, is as much a part of this record for use as this statement is?

The Court: Part of which record?

Mr. Jackson: Of the——

The Court: Yes, you have moved to strike out his testimony as to the oral admissions, is that your motion?

Mr. Jackson: I move to strike out all of his testimony.

The Court: On the ground that it is incorporated in this?

Mr. Jackson: No, sir.

The Court: Well, on what ground?

Mr. Jackson: On the ground that he was in custody at the time and you have ruled on that.

The Court: I have passed on that, sir, and ruled that it was a voluntary statement as a matter of fact. Now I have given you an exception to that ruling.

Mr. Jackson: I was going to ask your indulgence if you will allow me—you see what I am particularly anxious

about here is that the testimony which was given by the witness this morning on cross-examination is divergent from, in specific instances I am sure, and much of that omitted from this statement.

The Court: Show us the specific instances where there is a contradiction; I have asked you that before and you [fol. 181] said you did not object to it on the ground it was contradictory but on the ground that it was not sufficiently inclusive.

Mr. Jackson: I don't think I can answer that. Incidentally, I would like to have a minute longer.

The Court: All right, you may renew your motion later and I might say this further, which may have an effect on you, that even contradictory statements will be admissible. I think you had better confine yourself to something, some legal basis for excluding it on other grounds than contradiction, because the witness has testified to contradictory statements made by the defendant, once when he said he was not a member of the Nazi Party and again when he said he was a member of the Nazi Party. Now the jury will determine which of those to believe; and in the event you find inconsistencies between the written statement and the oral statement, that too, will be a question for the jury to determine, but it will not be a basis as I envisage it, for exclusion of either the written or the oral admissions.

Mr. Pearse: Does your Honor—I am a little confused—Have you objected to the admission of that written statement?

The Court: He is asking to strike from the record the oral testimony and then he is asking me to rule that this is not admissible.

Mr. Pearse: And your Honor has ruled against him?

The Court I have denied both.

Mr. Pearse: The rest of us have an objection to the introduction of this statement at this time on the ground that I raised yesterday.

[fol. 182] The Court: Well, I shall say that if it be admitted—I am giving counsel further opportunity to devise legal argument—but even if it be admitted it will be admitted only against Mayer himself until such time as participation in the general conspiracy may be shown by other members.

Mr. Pearse: Not if it is shown——

The Court: Wait a minute, wait a minute—and that the conspiracy was in existence at the time the statement was made. You see, you anticipate my specificity, Mr. Pearse.

Mr. Pearse: Judge, I have never done that in my life and you know I am not doing it today.

The Court: I wouldn't try it unless I were on sure ground if I were you.

* * * * * * *

OFFER OF EXHIBITS

Mr. Stanziale: Your Honor please, at this time I am moving to formally offer in evidence the exhibits which are identified or have been identified by Miss Illian, in connection with exhibit G-17 for identification which comprised the Nazi membership list on which these defendants are included; the invitations issued by or under the auspices of the German Consulate, Dr. Draeger, specifically, and that part of the testimony relating to the——

The Court: Well, you are not going to introduce in evidence testimony that is already in?

Mr. Stanziale: No, no, the exhibits relating to that, sir.

The Court: What are the specific exhibits?

Mr. Stanziale: The specific exhibits, sir, are exhibits 2 ——

[fol. 183] The Court: Wait a minute, now, that is 2 for identification?

Mr. Stanziale: Yes, your Honor, to 41.

Mr. Campbell: Through 41?

Mr. Stanziale: Yes, sir.

The Court: Inclusive?

Mr. Stanziale: Inclusive.

Mr. Pearse: I——

The Court: Well, I think that counsel would probably like to have time to examine these to see what they are because I certainly cannot recall what they are.

Mr. Stanziale: I have a list of them.

The Court: Let's see, what is number 2?

Mr. Stanziale: Number 2 is the applicaton for membership.

The Court: Any objection to that?

Mr. Pearse: I think I know what they are: I think we all know what they are.

Mr. Stanziale: They looked at them the day before yesterday.

Mr. Pearse: They are the exhibits that Miss Illian identified.

Mr. Stanziale: Yes.

The Court: You are offering them now?

Mr. Stanziale: Yes.

Mr. Pearse: They were offered, I understand, and your Honor reserved decision.

The Court: Yes, to give you an opportunity to examine them.

Mr. Pearse: And I still object.

The Court: On what ground,

[fol. 184] Mr. Pearse: To their introduction in evidence so far as the defendants whom I represent are concerned, because it has not been proven that they had any knowledge of or connections with any of the things or any of the exhibits which Miss Illian identified.

The Court: Except as she testified, Mr. Pearse, that the list was made up from the application cards of men who had requested membership in the Nazi Party.

Mr. Pearse: But there is no proof that the three defendants whom I represent, even though there might be similiar names on these lists, are the defendants named in those lists.

Mr. Azzoli: May I make the same objection, as far as the defendants whom I represent who are two, are concerned, Willy Max Zimmer and Edgar Ulrich.

Mr. Pearse: Now, if the Court please, it has not been proven anything by these exhibits except the course of conduct, shall we say, in the Consul's office with respect to joining the National Socialist Party in Germany. There is no proof that either of the three defendants whom I represent ever executed any of these papers which have been identified as papers which must be executed before you can become a member of the Party; and in the absence of such proof the mere fact that there may have been a course of conduct concerning other people is certainly not binding on these men until they are identified as having been three of the persons who did the very things that she testified to, that had to be done in order to become a member.

Mr. Stanziale: Other than this fact, sir——

[fol. 185] The Court: Wait a minute now, we will see. Is there any other argument? I will take it that you all join in that motion?

Mr. Jackson: If your Honor please——

The Court: Wait a minute, let me talk. Is there any other basis for offering this motion than that which is alleged by Mr. Pearse? If so, I will hear you in the order prescribed, which is Mr. Pearse, Mr. Hayden——

Mr. Hayden: Your Honor please, I just want to elaborate on Mr. Pearse's objection and join in it. I think that Miss Illian testified that this list was made from the index cards and it was not shown that the index cards were exclusively taken from the application form which is one of the exhibits attempted to be put in evidence. It has not been shown that any of the defendants filled out these forms at the office; it was just a general scheme of the Party in the United States and therefore has not been tied up with defendants and I join in Mr. Pearse's objection.

The Court: Mr. Azzoli.

Mr. Azzoli: I join wholeheartedly with what Mr. Pearse stated with the further observation as stated by Mr. Hayden, and further that I think the examination was made of Miss Illian as to these cards and the origin of these cards from which she obtained information to make up this list, whether those cards had the signature of any of the men whose names appear thereon—there is no such evidence—so that she would have known whether they were signed by anybody. All we know is she took them from a card; how they got there, who made them up—she found them there; they were in that office, and in order to bind these defendants there must be something more than that, sir.

[fol. 186] The Court: Mr. Gechtman.

Mr. Gechtman: I join in the objections offered by counsel before and would like to add this one thing. Many, if not most, of the exhibits which were identified by the witness Illian are blank forms that merely show a course of conduct and nothing else. Nothing has been tied in with any of these people, and on my cross-examination of Miss Illian she was not able to identify the defendant whom I represent, and for all I know, is unable to identify anyone else.

The Court: Mr. Campbell.

Mr. Campbell: I join in the motions as made with the further observation, my recollection is that the witness Illian

testified as to a course of conduct which existed only during the period of her employment which was from March '39 until May '41 and she knew nothing about and testified nothing about what those who had become members prior to her employment had to do or what was required of them in order to become members.

The Court: Mr. Lordi.

Mr. Lordi: I join in the objections offered by the other counsel. I guess everything has been said.

The Court: Mr. Jackson.

Mr. Jackson: I join in the objections which have been made and emphasize with respect to the last one that the forms which were submitted here, I have been informed were not necessarily forms that were always made use of; people that may have made applications may have had to put different forms in: there are many forms here which were not in existance in the earlier days, of which I have been informed; for which reason I do not think they properly represent all of the defendants that are involved here.

[fol. 187] The Court: Mr. Stanziale.

Mr. Cole: I think you forgot me, your Honor.

The Court: Oh, Mr. Cole, I am frightfully sorry.

Mr. Cole: I add my own objection on the ground which I urged before this trial began on the question of the constitutional invasion of rights of my client and the question of the limitation period.

The Court: Well, I am concerned now solely with the question of the admissibility of these papers.

Mr. Cole: That is the point I make. There is no evidence as to my clients for the period prior to the period alleged in the indictment.

Mr. Stanziale: Your Honor, Miss Illian testified without going into detail, when she was in the office from March to May that these particular forms that she identified were the forms used in the Consulate's office. We have also shown a general course of conduct by the Consul in connection with Party activities and then we come to the crux of the testimony by Miss Illian which stated that some time in September or October of 1940 the Consul was calling members in batches of ten to fifteen to call at the office and there to receive instructions as to how to answer alien forms. The first instructions were to deny outright membership in the organization.

The Court: How about the personal identification of these defendants?

Mr. Stanziale: She has testified that the list of G-17 for identification comprised a list of members.

The Court: Let me see that list, please.

(G-17 handed to the court by the clerk.)

Mr. Stanziale: And these defendants are included.

Mr. Pearse: I object to that statement that these defendants are included. He hasn't shown it.

[fol. 188] The Court: He has made the statement; let him argue. I gave you a chance to argue. You may respond later.

Mr. Stanziale: One further observation. If you will look at the list she testified that she was told both by Draeger and Vogel that this list comprised the members of the organization.

The Court: No, but Mr. Pearse's first objection was this: That there might be—I am not giving now Mr. Pearse's entire allegation,—I am trying to give the effect of it—there might be six "Hans Bauer" for instance. How do we know which Hans Bauer is the Hans Bauer of this list?

Mr. Stanziale: In this regard——

The Court: How do we know that if the name—for instance, take the name of someone not on trial, Karl Johann Boehm, were on this list,—how would you know which Karl Johann Boehm it is?

Mr. Stanziale: We have offered in evidence and there has been received in evidence the alien registration form of the particular defendants on trial.

The Court: Yes.

Mr. Stanziale: Now——

The Court: And they contain what?

Mr. Stanziale: That they were not members; in some instances they denied membership in the organization; in other instances they stated that they were non-resident members of the German Labor Party. Now in going further may I state this one point: The purpose of my offer of these exhibits at the present time is that we have shown that at least as far as Draeger and Vogel is concerned——

The Court: Are you closing your case with these exhibits?

Mr. Stanziale: No.

[fol. 189] The Court: Well, proceed then with your case and I will pass on this later.

Mr. Stanziale: Very well. May I have marked in evidence at the present time the statement of Friedrich Mayer?

The Court: I shall permit counsel to argue further if he has a new argument that he has not already given. I don't care to hear repetition of what you have already said.

Mr. Jackson: Well, I say that I have read this over and to my mind it is manifestly evident that it is as unfair and——

The Court: I have ruled that it is voluntary, don't go into that again.

Mr. Jackson: I understand that.

The Court: Well, then don't argue it again.

Mr. Jackson: All right, I accept it, if your Honor please. I also make the further statement that this statement was taken when there was no charge against Mr. Mayer.

The Court: I have passed on that. I have asked you to confine further argument to that which you have not yet presented. I have passed on its voluntary nature and I have passed upon the fact that both oral and written statements, provided they were made voluntarily, are admissible and the jury will pass upon which is the truth. If there are any new arguments you can advance I will be glad to hear them but I don't want to hear what you have already argued.

Mr. Jackson: Principally because the statement if left unamplified with particulars, if shut out from telling the further facts that belong there, would do a great injustice. [fol. 190] The Court: No, it wouldn't; it is his statement. He signed it; no one made him sign it. If he wanted to add more he should have done it and if he wants to go on the stand now and deny that he made it or amplify it, there is nothing to stop him. But so far as the admissibility of it is concerned on what you have argued so far I will rule that it is admissible and you may have an exception to my ruling unless you have several arguments that you have not yet advanced that you care to have me hear.

Mr. Jackson: Well, I think I have covered the ground.

The Court: Very well then, that is my ruling. I shall admit it in evidence and you may have an exception, and so far as the other defendants are concerned I have indicated its effect.

(Received and marked Exhibit G-56 in evidence.)

(Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

* * * * * * *

Mr. Stanziale: No, this is the Fiswick statement.

Mr. Pearse: Let's stick to Fiswick first. That's all right. And of course I am consenting to the admission of these statements only as to the individual defendants, if the court please, whom they may affect.

(The Fiswick statement is received and marked Exhibit G-65 in evidence.)

Mr. Stanziale: Now, in connection with the defendant Poehlmann may I call Mr. John Firmin, F. B. I. agent?

[fol. 191] Mr. Pearse: Well, now, if you are offering in evidence the first statement that he made, if the Court please, as a matter of courtesy to me I would like to have an opportunity of reading the statement so that I could be better prepared if it is necessary to cross-examine Mr. Firmin on the second statement.

The Court: What are you going to do now, introduce verbal statements?

Mr. Stanziale: Yes. Might I suggest under those circumstances because we are going to have Mr. Firmin's testimony, that the statement be read to the jury.

Mr. Pearse: That's all right.

The Court: No, I don't think so at this time.

Mr. Pearse: But I would like an opportunity of reading the first statement, if the Court please. I haven't seen it.

The Court: Just a moment.

Mr. Stanziale: Your Honor please, I want the record to show that I am offering Mr. Firmin because there has been reference to two statements having been made.

The Court: Are you going to try and prove something by oral statements which are not included in the written statement?

Mr. Stanziale: Other than the fact that Mr. Firmin's testimony—Mr. Firmin's testimony will be an elaboration of questions number ten and number fifteen that are included in the statement of the question and answer form, but there is an elaboration with Mr. Firmin.

The Court: All right, confine him to that.

Mr. Pearse: Wouldn't your Honor let me read this over first and let Mr. Stanziale go on with somebody else?

[fol. 192] The Court: Well, if he confines it to statements ten and fifteen, as I have confined him, I will let him say that is not the statement.

Mr. Stanziale: There is one more further request in reference to Fiswick, your Honor. There are two letters that Mr. Fiswick sent to the office; I think you would want them to go in with the others.

Mr. Pearse: Yes, I would. I have copies of them.

The Court: You have the Poehlmann one; now will you let me have the Fiswick statement?

Mr. Stanizale: Yes, sir. Will you put that with the Fiswick exhibit (to the clerk).

* * * * * * *

GEORGE F. DINNEEN, called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. Stanziale:

Q. Mr. Dinneen, are you an agent of the Federal Bureau of Investigation?

A. Yes, I am.

Q. Do you know the defendant Ferdinand Fiswick in this case?

A. Yes, I do.

Q. Did you have occasion to interview him?

A. Yes, I did.

Q. Can you tell us the first time when?

A. I first interviewed——

The Court: We have the statement here, Mr. Stanziale.

Mr. Stanziale: Yes.

The Court: Do you want to produce from this witness anything not found in the statement?

[fol. 193] Mr. Stanziale: Well, the fact that there was a denial first and then the statement given.

Mr. Pearse: Well, all right, let it go.

A. I first talked to Mr. Fiswick April 29, 1944, at his home in his delicatessen located at 145—48th Street, Union City, New Jersey.

Q. What was said to you at that time and what did you say to him?

Mr. Pearse: May I ask Mr. Stanziale if he is going to show something different from what is in the statement.

The Court: I have asked him that. Mr. Stanziale says he wants to show he made one statement at one time and then changed it.

Mr. Pearse: May I have the privilege of looking at Mr. Fiswick's statement then before he goes on?

The Court: Maybe I can shorten it for you by pointing out the pertinent parts of it.

Q. Proceed, Mr. Dinneen.

A. When I first talked to Mr. Fiswick on April 29th——

Mr. Pearse: Well, I ask to be given just a moment, please. All right. Thank you, Mr. Stanziale.

A. (Continuing:) —when I first talked to Mr. Fiswick on April 29, 1944, at his delicatessen and home he stated that he had told an Alien Enemy Hearing Board at Newark, New Jersey, on January 7, 1944, that he was not a member of or a prospective member of the Nazi Party in the United States. He stated that he had also been interviewed by agents of the Newark office of the F. B. I. and had told them he was not a member of or a prospective member of the [fol. 194] Nazi Party. He told me at the outset that he was not a member nor a prospective member of the Nazi Party. We explained to Mr. Fiswick at the outset of the interview that we wanted him to tell us the truth about his membership in the Nazi Party, and we would appreciate it if he would tell us at the time of that interview. He then told me that he desired to tell the truth and he would feel a lot better if he got the thing off his mind and then he proceeded to tell me everything that is contained in the signed statement.

Mr. Stanziale: I have no further questions.

Cross-examination.

By Mr. Pearse:

Q. Mr. Dinneen, Mr. Fiswick told you then, did he not, that at one time he had applied to become a member of the Nazi Party, didn't he?

A. Yes, sir.

Q. And he told you that the reason for it was that at that time he expected that he might go back to Germany and go into business there, didn't he?

Mr. Stanziale: Just a moment.

Q. Didn't he?

Mr. Stanziale: Just a moment, Mr. Pearse. If your Honor please, that is what I had hoped to avoid when I wanted to put the statement in evidence, both oral and written. I think that before the cross-examination should be conducted, I think the jury should have before it the entire conversation and the statement and then the cross-examination. It puts me in an unfair position, sir.

The Court: No, it doesn't.

Mr. Stanziale: May I finish?

The Court: No, it doesn't put you in an unfair position because you see I asked him if there were anything in the [fol. 195] oral statement that wasn't in the written statement and you said that you would bring out what was in the written statement. Now, if it is in the written statement you cannot complain and if it is not in the written statement, you had a chance to bring it out. But I don't want to just pursue a lot of guff just for the sake of getting every "t" crossed, every "i" dotted at the expense of a waste of time. We have been four days at this now and I don't want to spend much more time on it. The statement is pretty conclusive.

Mr. Stanziale: I realize that, sir, but I think the statement should be before the jury before the cross-examination is conducted. That's the only thing, I think, the jury should have the benefit of that.

The Court: No, I think—you see, Mr. Stanziale, you are concerned in having justice done. So am I. But we are concerned from different angles. I see the over-all picture and you see only that side of it at the present time; I am concerned with the rights of each of these defendants at every moment. You are concerned with producing your proof which is effective against one defendant at this particular moment. I can see the harm that could conceivably result to other defendants.

Mr. Stanziale: Very well, sir.

The Court: And I know if you will consider it from that angle you will appreciate why I don't want it read now.

Mr. Stanziale: All right, sir.

A. Yes.

Q. And he also told you that he was told by the Consul that unless he joined the Party if he was going back to Germany he couldn't go back unless he was a member of the Party?

A. No.

[fol. 196] Q. Didn't he tell you that the Consul told him that he couldn't get a visa or a proper passport in order to return unless he was a member of the Party?

A. No.

Q. He didn't tell you that?

A. No, sir.

Q. Did he tell you that the reason he made the application to become a member of the Party was because at that time he expected that he might return to Germany; isn't that right?

A. That's right.

Q. And he also told you that he never did return to Germany, didn't he?

A. That is correct.

Q. And he also told you that he never did become a member of the Party?

Mr. Stanziale: Just a moment. I think we should object to that. We are not concerned with why he became a member of the Party.

The Court: Did he say he became a member?

The Witness: He told me that he had become a prospective member of the Party.

Q. In other words, he said he made an application as the statement indicated?

The Court: No, he said in the statement he was a prospective member.

Q. Do you know what he meant by his being a prospective member?

The Court: It doesn't make any difference.

Mr. Pearse: I withdraw it.

* * * * * * *

[fol. 197] DONALD A. ROSEN, called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. Stanziale:

Mr. Stanziale: Has the attorney for Mr. Rudolph—has he the statement?

Mr. Lordi: No, I have turned it over to the FBI.

Mr. Stanziale: I suppose we can save some time offering the statement in evidence if there is no objection by counsel.

Mr. Lordi: I have read the statement. So far as my client individually is concerned, I will allow it in evidence.

The Court: It may be received and marked in evidence.

(Received and marked Exhibit G-67.)

Mr. Lordi: That is two statements.

Mr. Stanziale: Yes, two statements.

Q. Did you have any conversation with this defendant in connection with his membership in the Party, sir?

A. I did.

Q. What, if anything, was said in that regard?

A. The conversation was on November the 17th, 1943 at his home in Teaneck, N. J. At that time he was asked whether he belonged to the N. S. D. A. P.

Q. What is the N. S. D. A. P.?

A. A National Socialist German Workers' Party; and at that time he stated that he had made application for membership in that Party.

Q. All right. Did you have any conversation whether he paid any dues?

A. He stated that he made his application in March of 1938 at which time he paid the initial dues and that he [fol. 198] continued paying dues over a period of time and estimated that the amount he had paid during that period of time was $14.

Q. When you state the N. S. D. A. P. do you mean the Nazi Party?

The Court: No, it is the Workers' Party, a branch of the Nazi Party.

The Witness: No, your Honor; that is incorrect. The N. S. D. A. P. is the Nazi Party; it is the National Socialist German Workers' Party, the Nazi Party of Germany.

The Court: Well, what is the name of the National Socialist Party? Isn't there a workers' branch which is referred to as the Arbeiterpartei? Or is that the full name of the Nazi Party?

The Witness: The National Socialist German Workers' Party is the English translation of the Nazi Party.

Q. It is the Nazi Party English translation of it?

A. That's correct.

Q. Was there any conversation as to going to the Consulate with reference to under the Registration Act?

A. Yes, there was.

Q. What conversation was had in that regard?

A. He stated that at the time of the 1940 Alien Registration he appeared at the Consulate in New York City and was advised by a person in the Consulate whom he described as an official of the German Consulate because he stated that he spoke to him in the office of the Consulate, which person told him that in the event that he was questioned concerning his membership in the Nazi Party that he should deny that he belonged to the Party.

Q. I see. What other conversation was had in that regard, sir?

A. He stated that—there was no further conversation concerning that alien registration.

[fol. 199] Q. Was there any conversation as to whether he received any invitations in connection with his membership in the Party?

A. There was.

Mr. Lordi: Your Honor please, that is in the statement.

The Court: All this is in the statement, Mr. Stanziale.

Mr. Stanziale: All right. Nothing further.

The Court: There was a second statement made, wasn't there?

The Witness: Yes, there was.

The Court: In that he denied that he received any information about responding to the registration from anybody at the Consulate?

The Witness: That is correct, your Honor.

The Court: All right. Both statements are in evidence.

Cross-examination.

By Mr. Lordi:

Q. When did you see Mr. Rudolph for the first time?

A. The first time I saw Mr. Rudolph was on September the 17th, 1943 at or about the hour of 9 or 9:30.

The Court: September or November?

The Witness: November. September was the second time.

Q. And was he at home at the time you called at his home?

A. He was not at home.

Q. And where did you find him?

A. He was in Cliffside I believe the name of the town is.

Q. Did you search his home at the time?

A. When he accompanied us back to his home.

[fol. 200] Q. No, when you went to his home, did you search his home before you saw him?

A. No, I did not.

Q. You say he worked in Cliffside, is that correct?

A. That's correct.

Q. Did you go to his place of employment?

A. I did.

Q. And did you find him there?

A. I did.

Q. What happened?

A. I asked him if he wanted to discuss some matters that he had told the Alien Enemy Hearing Board at the time that he was previously before the Board, which matters we had information about that he had not told the truth; and he stated that he would be glad to accompany us to his home to discuss the situation further.

Q. And when you went to his home did you search his house?

A. After we discussed the questions with him he consented to allow us to search his home, which consent is in a written instrument which is in the possession of——

Q. He offered no objection whatsoever?

A. That is correct.

Q. Did you take a statement at that time?

A. Yes.

Q. And you say this date was September?

A. That was November 17, 1943.

The Court: You did say September; I knew it was a slip of the tongue; later you said the second examination was in September.

Q. This was November?
A. This was November.

The Court: That was in 1943?
The Witness: Yes.

Q. And that was the first statement you took?
A. That is correct.
Q. At the time he gave you the statement, did he indicate [fol. 201] to you he had applied for the membership in this organization?
A. He stated in that connection that he had made application for membership and had received membership card at which time he paid the initial dues and thereafter continued paying dues over a period of time up to, as near as he could fix it, one or two months prior to Pearl Harbor.
Q. But he hadn't become a member of the organization as yet?
A. I do not know whether he was a member or not.

The Court: He had a card and he was paying dues?
The Witness: He had a card; that is correct.

Q. But he told you he had only applied for membership in the Party, is that correct?
A. That is correct.
Q. And did he give you a reason at this time for his applying for membership?

Mr. Stanziale: Objected to.
The Court: I will allow it.
Mr. Stanziale: May I be permitted to finish my objection, sir?
The Court: No, sir, I know what it is.

A. Yes, he did.
Q. And what was that reason?
A. He stated that he intended to further the interest of his family in Germany who were members of the German government.
Q. When you say "further the interest of his family in Germany" just exactly what do you mean?

A. He had hoped to secure advancement for his family in Germany who were members of the German government.

Q. And at the time this first statement was taken, did you advise him as to his rights?

A. I did prior to the time I executed the statement.

[fol. 202] Q. And this was prior to the time that he was taken to Newark for a hearing, is that correct?

A. Yes, that is correct.

Q. And at the time that you interrogated him was there anybody with you?

A. There was.

Q. Who was that?

A. Special Agent Studebaker of the FBI, Detective Samuel H. Dunn of the Teaneck Police Department.

Q. At the time he made this second statement, did he at that time indicate that he had gone to the German Consulate again? Do you understand my question?

A. No; will you repeat it, please?

(Question repeated by the reporter.)

A. Subsequent to the first statement do you mean?

Q. Yes, the second statement he made.

A. No, he made no such indication.

Q. And when was the second statement taken?

A. September the 5th, 1944.

The Court: Where was he then?

Q. Where was it taken?

A. It was taken at the office of the Federal Bureau of Investigation, 1836 Raymond-Commerce Building, Newark, N. J.

Q. Was that prior to the hearing held in Newark?

A. Which hearing are you referring to?

Q. I understand there was a hearing held in Newark.

The Court: An Alien Enemy hearing.

A. It was subsequent to the third hearing afforded Mr. Rudolph.

Q. And did he at any time indicate to you that he was following anybody's advice so far as the answering of questions 10 and 15 were concerned?

[fol. 203] Mr. Stanziale: Objected to as immaterial.

The Court: The statement speaks for itself. In the first statement he said he got information from Vogel, I think it was.

Mr. Lordi: Well, if your Honor please, I think this is very material in view of the fact that my client is being charged with being a part of this conspiracy.

The Court: Give me the statement, will you? I shall read—now, you have brought this on yourself—from the first statement which is in evidence. "At the time of the first Alien Registration in 1940 I was advised and counselled by the official at the German Consulate, New York, N. Y., to state on my registration form that I was not a member of this National Socialist German Workers Party. They stated if anything happened, just to deny membership in the Party."

Q. And did he say that he had followed the dictates of the German Consulate in answering that question?

Mr. Stanziale: Objected to. It makes no difference.

The Court: Did he say it?

A. He made no statement in that connection.

Q. You said he paid dues, is that correct?

A. That's what he told me.

Q. And did he tell you that he discontinued paying dues after a period of time?

A. He did.

Q. When did he discontinue paying his dues?

A. He stated that he discontinued paying dues a few months prior to Pearl Harbor, December 7, 1941.

Q. And did he give his reason for not paying any more dues?

[fol. 204] Mr. Stanziale: Immaterial. I object to the reason; we are concerned with the Registration Act of 1940.

The Court: We shall recess now for five minutes, ladies and gentlemen of the jury.

(A short recess was taken.)

Mr. Lordi: No further cross-examination.

Mr. Stanziale: Your Honor——

The Court: Are all the defendants here?

Mr. Pearse: Yes, sir.

Mr. Stanziale: Your honor, in pursuance of your ruling, I am offering in evidence without formally calling the wit-

ness, if there is no objection on the part of the counsel, the statement of Walter Fritz Wilhelm Burchardt.

Mr. Gechtman: Offering it in evidence?

Mr. Stanziale: Yes, in pursuance of the——

The Court: Well, you will only do that where there is no objection.

Mr. Gechtman: I would like to ask just one or two questions.

MOTION TO DISMISS THE INDICTMENT

Mr. Pearse: May it please the Court, in behalf of all of the defendants here on trial we move to dismiss the indictment and for the direction of a verdict of not guilty because the Government has failed to prove the allegation in the indictment as to each defendant here on trial. I think, sir, that is a sufficient statement of the general ground that we will advance. It may be necessary later on when the case of each individual defendant is taken up, to make an additional motion.

• • • • • • •

[fol. 205] The Court: Now, in order that there may be no mistake, a question has arisen which I conceive to be novel, as to whether or not there is a continuing conspiracy without a positive act; I am ruling that the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there (Page 432) is such continuous cooperation. That has been the determination of the Supreme Court where there was an act of commission; I am now extending it to a situation whereby cooperation may be indicated by failure to do some act to indicate a desire to bring to an end the continuing situation effected by the act previously done. Under that ruling, and in order that there may be no further mistake, I shall rule that all the statements which were made by each of the defendants, although they were made after 1940, will be admissible against each of the other alleged co-conspirators.

Now, that puts me in right up to my eyebrows, I cannot get out of it, if I am wrong and I want the question determined.

Mr. Pearse: Judge, you mean it puts us right up to our eyebrows.

The Court: No, it puts me in; I mean, there is no mistake about what I am trying to say, is there, Mr. Pearse?

Mr. Pearse: Not the slightest. Your Honor will allow us all an exception?

The Court: You may all have exceptions to my rulings and, as I have indicated before, any exceptions granted to [fol. 206] any individual defendant will be deemed to have been granted for each defendant as if counsel for that defendant had individually made the objection and had a ruling.

(Counsel for each defendant prays an exception, which exception is hereby allowed as to each defendant and sealed accordingly.)

Thomas F. Meaney (Sealed).

Mr. Pearse: Now, your Honor, we are adjourning until Monday morning?.

The Court: We are adjourning until Monday morning and I think probably 11 o'clock.

(Adjourned to Monday, December 4, 1944, at 11 A. M.)

• • • • • • •

Jacob Friedrich Mayer, a defendant herein, called and sworn on his own behalf, testified as follows:

Direct examination.

By Mr. Jackson:

Q. Mr. Mayer, where do you reside?

A. 215 Lawrence Avenue, Hasbrouck Heights.

Q. May I ask you to speak a little slowly and, as far as you can, very distinctly because the jury must hear and all of the people on that side of the room as well as the Court would like to hear, of course. That is in New Jersey, of course?

A. Yes.

Q. How long have you lived in the State of New Jersey?

A. 11 years.

Q. And how long have you been living in the United States?

A. Since 1923.

[fol. 207] Q. And in that year you came to America, did you?

A. That's right.
Q. Alone?
A. No, I came with my wife.
Q. How long had you been married at that time?
A. At that time I was married about a year.
Q. Are you in business?
A. Yes.
Q. What type of business are you in?
A. Bakery business.
Q. And where is your business located?
A. 287 Paterson Avenue, East Rutherford, New Jersey.
Q. How long have you been located at that spot?
A. 11 years.
Q. That is, since the time you came to New Jersey?
A. New Jersey, that's right.
Q. You have been located in the same place?
A. That's right.
Q. You said you were married. Have you any children?
A. Yes, I got two children, one daughter 18 and one boy eight, which is an invalid.
Q. He is what?
A. He is an invalid.
Q. That is the boy, eight?
A. That's right.
Q. Were they born in the United States?
A. Yes.
Q. Have you ever been back—You came from what part of Germany?
A. Bavaria.
Q. Have you ever been back to your native country?
A. No, sir.
Q. Have you any intention of going back?
A. No.
Q. Have you ever been convicted of any crime?
A. No, sir.
Q. Have you ever applied for citizenship?
A. Yes, I applied for citizenship in 1927.
Q. Say that over, please.
A. I applied for citizenship in 1927.
[fol. 208] Q. Did you apply alone or did you apply with your wife?
A. I applied with my wife.
Q. You applied together.
A. That's right.

Q. In 1927. Have you been made a full citizen yet?
A. No.
Q. Will you tell us one of the reasons at least why that s a fact?

Mr. Stanziale: I object, your Honor please, we are not nterested in that; we are interested in this particular case hether he falsely registered.
Mr. Jackson: I think I have a right to give a few facts with reference to citizenship and whatever else I have to bring out.
The Court: Go ahead.

A. In 1927 we applied for citizenship. Later my wife went to Germany and I didn't take it out. I did not apply for the second one. After that we came to Jersey and we got told, when we wanted to go for our second ones, we got told that they were not good any more going from one state to the other.
Q. Well, you applied in 1927 in New York?
A. That's right.
Q. And when was it you went to Jersey?
A. 1933.
Q. Have you taken out your final papers yet?

Mr. Stanziale: That is objected to.

A. I have applied for it.

Mr. Stanziale: Your Honor please, that is just the reason I am objecting to it.
The Court: I will allow it.

A. I have applied for it, I am waiting to be sworn in.
[fol. 209] Q. Are you a member of the Nazi Party or any other German organization?
A. No, sir.
Q. Have you at any time been a member of the Nazi Party?
A. I applied for membership but I was never accepted.
Q. You applied for membership?
A. That's right.
Q. When was that?
A. That was in 1936.
Q. Will you explain briefly the circumstances with respect to that application.

A. In 1935 my wife's father died, in the beginning of 1936 she received some papers from the court in Germany with a will. She took the papers and——

Q. Who is "she"?

A. My wife took the papers and went down to the Consulate.

Q. Now, you mean the German Consul?

A. The German Consul.

Q. Where was that located?

A. That was located in New York in Battery Place.

Q. All right.

A. After she came home we talked—she went there and left the papers there and I think she paid some money there. After she came home, we talked that matter over and at that time there was a woman working in the household——

Q. What was her name?

A. Aubrey.

Q. All right.

A. And she heard the conversation and she advised us if we wanted to get the money out of Germany somebody should join the Nazi Party, which was in power at that time.

Q. Then what next happened?

A. After that I decided to make application for—she couldn't do it.

Q. That was in 1936?

A. That was in 1936, yes.

Q. And did you go back down to the Consulate?

A. Yes, I went down with Miss Aubrey and filled out the application.

Q. Now, what did you do with the application then?

A. They took the application and they told me that it would be sent to Germany for approval.

[fol. 210] Q. It would be sent to Germany for approval?

A. That's right.

Q. And if it was approved, then what?

A. If it was approved I would get a membership book.

Q. Did you ever get a membership book?

A. No, sir.

Q. At no time?

A. No, sir.

Q. Did you ever inquire about it?

A. Yes, I inquired in 1940.

Q. You inquired in 1940?

A. I inquired in 1940.

Q. What were the circumstances which caused you to inquire about it at that time?

A. Well, in September, 1940 I got a letter from the German Consulate to come down on a personal matter.

Q. You got a letter—do you remember who signed it?

A. I think Dr. Draeger. At that time I didn't respond to it; I did not go down at that time.

Q. What did the letter say, just in substance only, just to come down?

A. Just to come down on a personal matter.

Q. Now, you did not go down on that occasion?

A. I did not go down.

Q. What next?

A. In December I got a second letter to come down again on a personal matter.

Q. December of that same year 1940?

A. That's right.

Q. Did you go down at that time?

A. I went down with the thought there maybe was something about the will.

Q. Whom did you ask to see there?

A. I went down and I asked for Dr. Draeger, which signed the letter; I got told that he wasn't in. I got referred to Mr. Vogel.

Q. To see Vogel. What is the first name, do you remember?

A. Hans Vogel.

Q. Hans Vogel?

A. That's right.

Q. Did you See Hans Vogel?

A. I did.

Q. At that time?

A. At that time.

[fol. 211] Q. Now, will you tell us, as far as you can remember, what you said to Vogel and what he said to you.

A. I showed him the letter.

Q. That is, the letter that you got from the Consul?

A. The letter that I got from Draeger, asked him what all about it, and he told me—he came out then that it was about the registration.

Q. That is, the registration of 1940 that is in issue here?

A. That's right.

Q. And what did you say, if anything?

A. Then I asked him if I was a member of the Nazi Party; he said——

Q. What did he say?

A. He said no; he said no, I was not accepted.

Q. That is, you were not accepted where?

A. In Germany.

Q. That is, they told you you would have to be accepted there?

A. Yes, in Germany.

Q. When you had made your application?

A. That's right.

Q. Now, he told you you had not been accepted?

A. That's right.

Q. Then what, if anything, did you say to him further?

A. Then I asked him, "Well, if I am not a member, then I put down in my question 'No?'" He says, "Yes." Then he asked me——

Q. What, if anything else, did he say?

A. He asked me if I was a member of some other German organization, I said, "No." He says, "Well, then, you cannot put down any. You have to put down 'I have not.'" He told me I should put down in question number 10 "Reichdeutschevereinigung."

Q. That is, what question was that the answer to? What question on that questionnaire was that the answer to that you put down? What number question was that?

A. Number 10.

[fol. 212] Q. That was number 10. Will you say that word again?

A. Number 10.

Q. No, I mean would you say that word that you put down?

A. Reichsdeutschevereinigung.

Q. What does that mean, or did you know what it meant then?

A. No, I did not.

Q. But you put it down?

A. Yes.

The Court: What does "vereinigung" mean?

The Witness: I think it means association.

The Court: Well, it is the Reichsdeutsche Association?

The Witness: Yes; I couldn't understand the name, I didn't understand what it was. I did not know.

Q. But you put it down?
A. I did.
Q. How did you happen to put it down? I say, how did you happen to put it down, to put that in there as an answer to number 10?
A. Well, when I went for registration I put it down.
Q. Well, why did you put it in there I am asking you. Did What's-his-name—what was the man you were talking with?

Mr. Stanziale: That is leading, isn't it?

A. Because I got told to.

Mr. Jackson: No, I am just asking the name of the man. I don't remember.

A. Mr. Vogel.

Mr. Stanziale: Your Honor, I must object to this. I haven't objected to a lot of things. Now he is putting it in the witness' mouth.
[fol. 213] The Court: No, he just wanted to know if it was Vogel. We all know it.

A. Vogel.
Q. Vogel told you?
A. Yes.
Q. I did not ask you before this, but when you filed your application card in 1936, or when you filed your application rather, I wanted to ask you did you get anything back from the application? Did you get a card or anything in 1936?
A. I got the card, yes.
Q. You got a card?
A. That's right.

Mr. Jackson: May I have the exhibits—those application forms I think?

Q. Did you get anything else at that time, any other paper?
A. No, sir.
Q. Now, you signed the application, is that correct?
A. Yes, sir.
Q. Do you remember, just in substance, what it said on that card?

A. It was my name, occupation, birthday and address, house number.

Q. What is the last?

A. My house number.

Q. Your address?

A. My address, that's right.

Q. And do you have that card?

A. No, sir.

Q. What did you do with that card, if anything?

A. At that time when he told me I was no member, I left the card there when I walked out.

Q. You left the card at the Consulate?

A. That's right, when I walked out.

Q. And you walked out. Now, you heard Miss Illian testify here the first day of the session in this case?

A. Yes.

Q. And you heard her testify as to a number of papers which were supposed or had to be signed?

A. Yes.

[fol. 214] Q. I call your attention to such as I can remember without spending the time of the Court to go through them—did you sign more than just one sheet or document for applications?

A. I only signed one.

Q. You only signed one?

A. That's right.

Q. Did you sign an affidavit that you had no Jewish blood in your veins?

A. No, sir.

Q. Did they ask you to sign that?

A. No, sir, not that time.

Q. Did you sign an affidavit or paper, in words or substance, that you were not a member of the Rotary Club?

A. No, sir.

Q. Were you presented with a button or something that you saw here?

A. No, sir.

Q. You were not?

A. No.

Q. Have you ever had one of those buttons?

A. No, sir.

Q. Have you ever seen one of those buttons except in court?

A. First time in court.

Q. I show you Government's Exhibit number 10, which is printed in German, and ask you if you ever saw that book except here in court?

A. No, sir.

The Court: Ever see anything like it?
The Witness: No.
The Court: Did you ever have one?
The Witness: No.

Q. You remember Mr. Bell testifying he was the agent who came to your house on September, was it, or November 22nd?

A. That's right.

Q. And he came to your house. Did you tell Mr. Bell all that you have testified to here?

A. No, sir.

Q. Why didn't you?

A. I didn't want to involve my family.

Q. Well, did he ask you any of these questions?

A. No.

[fol. 215] Q. That I have asked you?

A. No.

Q. As I recall, and you will recall also, whether I am about correct, Mr. Bell said you told him Mr. Vogel gave you a slip of paper with the answers you were to put on your registration blank; do you remember his testifying to that effect here the other day?

A. Yes.

Q. Well, now, did Mr. Vogel give you a slip of paper?

A. No. When I asked him he had the slip of paper in front of him with the names on, and he told me that must have been a mistake, I don't know.

Q. Well, did you ever have one of those slips of paper?

A. No.

Q. Did Vogel ever give you one?

A. No; he told me——

Q. He told you?

A. He told me I should put that down on question number 10 and 15.

Q. But he did not give you a slip of paper?

A. No, he did not give it to me. He had one.

Q. Now, when you went over to Ellis Island, when was that, that you got to Ellis Island after November 22nd?

A. I got to Ellis Island—it was after 10:00.
Q. Ten o'clock at night?
A. After 10:00.
Q. The next day?
A. No, the same day, November 22.
Q. The same day November 22?
A. That's right.
Q. Your examination first was up at your house?
A. That's right.
Q. And how long was the examination there?
A. Oh, to shortly 12.00.
Q. From what?
A. Shortly before 12.00.

The Court: How long a time, an hour, five minutes, or what?

The Witness: Oh, about two or two and a half hours.

[fol. 216] Q. What time did he start, what time did he come to your house?

A. I understand he was here around 8 o'clock. I was not at home.
Q. Around 8 o'clock?
A. That's right.
Q. And what time did you leave?

The Court: He wasn't there then.

Q. Oh, you were not there when he came. You hadn't been brought up. Who brought you?
A. I came later.

The Court: Well, he was two and a half hours there.

Q. Then you went to Newark?
A. Then I went to Newark.
Q. How long did you stay there?
A. We came here to Newark 1 o'clock.
Q. Did you have your lunch on your way down?
A. Yes, we had a sandwich.
Q. How long were you in Newark?

Mr. Stanziale: I object to all this.

A. I was in Newark to half past 8.00 at night.

Mr. Stanziale: Just a moment; we went through all this, your Honor, if the purpose is to attack the confession, he admitted it in evidence.

Mr. Jackson: There is no confession, your Honor please.

The Court: We have been through the voluntary nature of the statement. You have admitted it. No sense in going through all this.

Mr. Jackson: I am sorry, I didn't get your ruling on my question.

The Court: I say, we have been through the whole question of the statement which was admitted by you. I don't [fol. 217] see the sense now of the questioning, how long it took or anything else. It is admitted.

Q. I only wanted to ask this one question, your Honor. You got to Ellis Island on the night of the 22nd?

A. That's right.

Q. You were examined there that night, but later?

A. No, I was examined the next day.

Q. That brought you into the 23rd. Now, where were you on the 24th?

Mr. Stanziale: I still object, your Honor.

The Court: I will allow it.

A. The 24th I went to the hospital, Marine Hospital.

Q. What hospital?

A. Ellis Island, Marine Hospital.

Q. How long did you stay in the hospital?

A. I stayed there a little over three months.

Q. Then what?

A. I came back to the Island.

Q. Then what?

A. Then, after about two weeks, I went to the hospital again.

Q. How long did you stay this time?

A. About two months.

The Court: What are you trying to prove by this?

Mr. Jackson: I only want to prove the man went to Ellis Island, then went to the hospital and stayed altogether about four and a half months.

Q. Before you went to Ellis Island state whether or not you were under the doctor's care?

A. Yes.

Q. How long had you been under the doctor's care?

A. I am under the doctor's care for four years.

[fol. 218] Q. And had you been down sick on your back for some time before this?

A. Yes, I had been nearly six months in bed.

Q. Were you able to go to your business?

A. No, sir.

Q. Did you have anybody——

Mr. Stanziale: I object to all this.

The Court: I don't see what you are trying to prove. The charge here is not that he was well when he pretended to be sick or vice versa.

Q. When you made your application at the German Consulate, as you testified, whom did you see on that occasion when you went there?

A. I seen Mr. Von Wimmersberg.

Q. Will you spell that name if you can?

A. W-i-m-m-e-r-s-b-e-r-g.

Q. Wimmersberg. Who was he, if you know? Was he the Consul?

A. I don't know what he was. At that time he was not a Consul.

Q. Who was the Consul, if you know?

A. I think Borchers, something.

Q. Spell that; B-o-r-c-h-e-r-s, is that correct?

A. Yes, something.

Q. And the first name, do you know that, Hans?

A. Hans.

Q. Hans Borchers. Did you see—when you went there in 1936—did you see Mr. Draeger?

A. No, sir.

Q. Did you see Vogel there in 1936?

A. No.

Q. When did you first see Mr. Draeger, do you remember?

A. I see Mr. Draeger in 1939.

Q. And did you see Mr. What's-his-name—Franz Vogel, —Hans Vogel, is it?

A. Yes.

Q. Did you see Vogel there in 1936?

A. No.

Q. When did you first see Vogel, if you remember?

A. I don't quite—I cannot say when I seen him that time.

[fol. 219] Q. Did you see him at the same time you saw Dr. Draeger?

A. I seen him once before when I went down to inquire about the estate.

Q. How far back is that? You saw Draeger in 1939,—was it the first time?

A. Yes.

Q. And then would it be 1938 you may have seen Vogel first?

A. No, it was before that.

Q. It was before that?

A. That's right.

Q. But in any case, Vogel was not there, as far as you know in 1936?

A. No, sir.

Q. Nor Dr. Draeger?

A. No, sir.

Q. And this Fritz Zeglin—when did you see him?

A. I never seen him.

Q. You never saw him. Mr. Bell testified that you told him that you and 15 or 20 others—I don't know that that is quite exact, but to give you a general idea—met at Mr. Draeger's office in 1939 and he asked you if you wanted,—"he" meaning Dr. Draeger, asked you if you wanted to go back to Germany. Will you tell us about that, please.

A. In 1939 I got a letter signed by Draeger to come down to the Consulate. I went down to find out what was all about it.

Q. When you got down there whom did you see or whom did you ask for?

A. When I came down I asked for Dr. Draeger which he signed the letter. They led me in a room. When I came in there was some fellows there, 15 or 20; then he asked who wanted to go——

The Court: Who?

The Witness: Draeger.

A. Draeger asked who wanted to go to Germany.

Q. How did they indicate that, did they say "Yes," "No," "I do," or "I don't"?

The Court: What did you say?

[fol. 220] The Witness: He asked them to raise their hand. Some raised their hands. I did not.

Q. What did you do?

A. I did not want to go to Germany.

Q. What did you do?

A. After that I walked out.

Q. After he asked that question, you mean?

A. After he asked that question I walked out because I thought when I got the letter it was concerning the estate, the will.

Q. You thought it was concerning the estate, the will that you took down there in 1936?

A. That's right.

Q. Did you know any of these men that you saw in the office of Dr. Draeger?

A. No, sir.

Q. Had you ever seen them before this occasion?

A. No.

Q. Or had them pointed out to you?

A. No.

Q. You never had any conversation with them, did you?

A. No.

Q. And did you know, either from the letter you got from the Consulate or from any other quarter, why it was you were to go down to the Consulate on that occasion?

A. No; it always said to come down on a personal matter.

Q. And you had no conversation with anybody prior to that, did you?

A. No.

Q. With respect to going down?

A. No.

Q. And you went alone?

A. That's right.

Q. When you went to the Consulate in 1936 and filed your application, did you pay any dues?

A. Yes.

Q. And then how often, or approximately, did you go down to the Consulate after 1936 up to the time when Dr. Draeger asked you to come down in 1939; about how often did you go down?

A. I was there about four or five times.

Q. That is, did you go down about a couple of times a year, maybe, something like that?

The Court: What did you do down there for?

[fol. 221] The Witness: To find out if they got the answer from the other side about the estate.

The Court: Did you ever go down for any other reason?

The Witness: No, sir.

Q. Well, did you ever get any answer with respect to the papers that were taken to the Consul?

A. Never did.

Q. Did you ever find out—Well, what did they do with them, if you know? Did they send them to Germany?

A. I suppose so, I don't know.

Q. Did they ever tell you that they had been received over there?

A. No.

Q. Did they ever tell you anything about what was being done?

A. They said they was going to send them to Germany and they wait for an answer.

Q. And you never got the answer from them?

A. No.

Q. Did they tell you anything about why there was such a delay?

A. No.

Q. You heard testimony here about holiday gatherings and dances and parties and so forth; did you ever at any time attend any of these gatherings?

A. I did not.

Q. Did you ever, at any time or at any place, attend any meetings of the Nazi Party?

A. No.

The Court: Did you ever get any notices inviting you to the festivals?

The Witness: Yes, I got notices; I never went.

The Court: You never went?

The Witness: I had no time.

Q. You saw the variety of notices; did you always receive those notices, do you remember?

A. I don't know, I wasn't much in the store, I was occupied in the shop.

Q. Anyway, if you got any of those notices or invitations, what did you do with them?

A. We threw them always away.

[fol. 222] Q. You did not attend any of those parties?

A. I did not.

Q. Did you ever go to any of the moving pictures which were testified here that were held?

A. I did not.

Q. Any if anybody testified that they saw your picture in—saw your face or your likeness in a picture taken at any of these moving pictures, is that true or false?

A. That is false.

Q. You never went to any?

A. No, sir.

Q. Did you ever at any time or place participate in any of the activities of the kind that were indicated here of the Nazi Party?

A. I did not.

Q. Have you ever since you came to America knowingly, willfully, unlawfully or feloniously combined, conspired, confederated and agreed with Frederick Draeger, Hans Vogel and Fritz Zeglin and with the German Ambassador to the United States, a. l with the members of his staff and with other representatives of the German Reich and with any persons soever, in particular, with any of the persons named as defendants in this action, have you ever with any such persons offered or attempted to defraud the United States of America in any manner in any matter or in anything soever?

A. No.

The Court: Do you understand that question?

The Witness: Yes.

Mr. Jackson: I don't, your Honor, after I am through with it.

Q. Well, anyway, you never met any of the people that are involved in this action, did you?

A. I did not.

Q. Or saw them, I mean?

A. No.

Q. Or conferred with them?

A. No.

Q. Or did you ever have any conversation with or make any agreement with anybody soever that was associated with this Party?

A. No.

[fol. 223] Q. If you don't understand this question I will repeat it to you or ask that it be repeated. Have you ever at any time fostered, defended, advocated and furthered—Do you understand the general meaning of those words?

The Court: Finish the question.

Q. (Continuing)—the political activities, public relations, and public policy of the Third German Reich and the Nazi Party and Adolf Hitler?

The Court: Did you ever work with German interests while you were in America?

The Witness: I did not.

The Court: Or for Hitler's interests?

The Witness: I did not.

The Court: The Fuehrer?

The Witness: No.

The Court: Or the Nazi Party?

The Witness: No, sir.

The Court: Did you ever do anything to help them?

The Witness: I did not.

Q. When you made your application for membership in the Nazi Party, as you testified, in 1936, did you do so with intent to injure or deceive the United States in any manner whatever?

Mr. Stanziale: Objected to.

A. No.

The Court: He has answered it, he has answered no.

Q. And between 1936 and 1940, or at any other time since 1940, did you ever meet any of these persons or talk with them?

A. No.

[fol. 224] Q. Or make any agreement of any kind with them?

A. No.

Q. Or with any persons not named?

A. I did not.

Q. Connected with that Party?

A. No.

Q. To defraud the United States in any manner whatever?

A. I did not.

The Court: Did you ever enter into any plan with anybody at all to put a wrong answer in your registration?

The Witness: I did not. No.

Q. That is all.

Cross-examination.

By Mr. Stanziale:

Q. Mr. Mayer, you say that in 1936 you went with Marie Aubrey to make an application to join the Nazi Party, is that correct?

A. That's right.

Q. At the time that you made your application how much money did you give Von Wimmersberg?

A. I think it was around ten dollars.

Q. Ten dollars. Now, did Von Wimmersberg tell you what the $10 was going for?

A. No.

Q. Didn't he tell you that $1.50 was the initiation fee?

A. No, he did not at that time.

Q. Didn't he tell you that $3 was three months in advance?

The Court: What did he tell you he wanted the ten bucks for?

The Witness: He said five is for fee and five is for dues.

Q. When he said five for fees didn't he tell you it was for propaganda purposes?

A. No, he did not, he said just "fees."

[fol. 225] Q. You continued to pay dues until the year of 1941, didn't you? Didn't you?

Mr. Jackson: I object to that.

A. No, sir.

Mr. Jackson: There is no testimony here or proof to that effect.

The Court: It is cross-examination, I will allow it.

Q. You paid dues to the Nazi Party until the year of 1941, didn't you?

A. I—the last dues I paid was in 1939.

Q. 1939?

A. That's right.

Q. So that from 1936 to 1939 you paid dues of a dollar a month to the Nazi Party, didn't you? Didn't you?

A. I always paid ahead

Q. You paid for the full year?

The Court: How much did you pay, $3 at a time?

The Witness: Five, six, eight once.

The Court: Paid ahead, paid up to——

The Witness: I don't know to which time I paid up.

The Court: But to 1939?

The Witness: Yes.

Q. Then in 1939 you got a letter to go to the German Consulate, didn't you?

A. That's right.

Q. And there the German Consul, Dr. Draeger, said in the presence of yourself and 10 or 15 or maybe 20 other persons, "Who want to go back to Germany?"

A. That's right.

Q. And persons who raised their hands gave their assent to go back to Germany, isn't that right?

A. I suppose so.

[fol. 226] Q. Now, let me ask you this. When you got correspondence from the German Consulate, either before 1939, after you became a member, or at the time that you got the letter to go to the German Consulate in 1939, the letters were addressed to you as "Dear Party Member," isn't that right? H'm? Now, is that right or wrong?

A. I don't remember.

Q. You don't remember?

A. No, I only got two letters: that was in 1939 and 1940.

Q. Now, how were you addressed in those letters, as "Dear Member," weren't you?

A. I don't know, I cannot remember that.

Q. You don't remember? Now, let me ask you this. In September or October of 1940, you went to the German Consulate to ask how your alien form was to be signed, isn't that right?

A. No, sir, I went down in December.

Q. All right, in December. Did you go yourself or did you get a letter from the German Consulate?

A. I got a letter in December.

Q. All right. And when you went there you spoke to whom, to Draeger, or to Vogel?

A. I spoke to Vogel.

Q. You spoke to Vogel. He told you that he sent for you because he wanted to talk to you how you should fill your form out, isn't that correct?

A. He didn't send for me. Draeger sent for me.

Q. Draeger sent for you to instruct you how to fill your form out, isn't that correct? Is that correct?

A. He said it was about the registration.

Q. All right. Now, at that particular time Vogel asked you to turn in your membership card, didn't he?

A. He did not, no he did not.

Q. When did you turn in your membership card?

A. After I was through with Vogel I said.

Q. When did you turn in your membership card?

A. In 1940.

[fol. 227] Q. At the time that you went to register or the time you went for instructions as to how you should register?

A. That was before the registration.

Q. How long before?

A. Oh, that was a few days before.

Q. A few days before. Did you bring it down personally?

A. No, that was the time when I went down to find out what was all about that letter.

Q. Yes, and that is what I am asking you. So that at the time you went down to find out how you should register, you turned in your card that same day after you spoke to Vogel?

A. I gave it to him.

Q. You gave it to him?

A. That's right.

Q. Didn't he ask for that?

A. No, sir, he did not.

Q. Didn't Vogel say to you that you had to deny that you were a member of the party?

A. No, he did not.

Q. And didn't he say that you shouldn't tell anyone you were a member of the Party?

A. No, sir, he did not.

Q. Now, you signed a statement, didn't you?

A. Yes, I did.

Q. And in your statement didn't you say that Vogel stated that you were not to tell anyone who asked you about the—(withdrawn.)

Q. You had a conversation with him about the Reichsdeutschevereinigung, didn't you?

A. Yes.

Q. You were not a member of this organization, were you? Were you?

A. Of what?

Q. Of the Reichsdeutschevereinigung.

A. No, no, sir.

Q. And at the time that you spoke to Vogel didn't Vogel say that you should put in your registration form that you were a member of the R. D. V., didn't he say?

A. He didn't say that I was a member of it.

Q. But didn't he tell you to put in your registration form that you were a member of the R. D. V., didn't he tell you to say that?

A. He told me to put that in, yes.

[fol. 228] Q. And you put that in your registration form, didn't you?

A. Yes.

Q. And you knew that you weren't a member of the Reichsdeutschevereinigung, isn't that so? Isn't that so?

A. Yes.

Q. Then why did you put it in, why did you lie? You weren't a member of the Reichsdeutschevereinigung; why did you put it in?

A. Because he told me to.

Q. But you knew you were not a member, didn't you?

A. Well, he told me to put it in and I put it in.

Q. And you knew that you were putting in your registration form a non-truth, because you were not a member of the Reichsdeutschevereinigung; isn't that correct?

A. Yes.

Q. Now, isn't it also a fact that at the time that you went and spoke to Hans Vogel he wrote out for you the answers that you were to put on questions number 10 and the answer you were to put on question number 15; isn't that so?

A. No, he did not.

Q. Well, you signed the statement and in the statement you said——

A. As I said before, that must have been a mistake.

Q. Oh, the man, the FBI make a mistake?

A. No.

Q. Didn't you tell the FBI man that Mr. Vogel wrote out the answers? Didn't you tell the FBI man that?

A. He had on the table in front of him and he read it off the paper. That is all. He didn't give me a slip of paper.

Q. What did he give you, verbal instruction as to putting it down?

A. He just told me what to put down on 10 and 15.

The Court: Did he tell you about the Reichsdeutschevereinigung?

The Witness: First he asked me——

The Court: No, did he tell you about that?

The Witness: Yes, he told me about it.

[fol. 229] The Court: Did you write that down?

The Witness: I wrote it down.

The Court: No, but did you write it down at the time he told you?

The Witness: No.

The Court: How could you remember the name of it?

The Witness: Well, I could remember that.

Q. Isn't it also a fact—you say that you were not a member of the party—that at the time you went to talk to Draeger in 1939, when he asked which members wanted to go to Germany, that Draeger said that you could become citizens of the United States and you could also remain in the Party, but that everyone had to remain faithful to the Fuehrer and the Party; didn't you make that statement to the FBI agent?

A. Something like that was said when I came in the room.

Q. What do you mean that you weren't a member of the Party if Dr. Draeger told you you should remain faithful to the Fuehrer and the Party, what did you mean by that that you weren't a member of the Party? Why should he say that?

A. I don't know; they were through and he asked right away who wanted to go to Germany. After that I walked out.

Q. Isn't it also a fact that at the time you went to Vogel in 1940 in connection with your registration, you said this: "Vogel told me not to tell anyone who asked me about the Nazi Party, and that the Reichsdeutschevereinigung was a welfare organization"?

A. He did not say that, no, sir.

Q. You read your statement when you signed it, didn't you?

A. He did not say that.

Q. Isn't it also a fact that he told you to leave out that you were a member of the National Socialist Workers Party?

A. No, sir.

[fol. 230] Q. Are you sure of that?

A. Yes, sir.

Q. And isn't it also a fact that you stated to the agent that as a result of the meeting in September, 1939, "I was not so much in favor of the Party any more"?

A. I didn't—Would you mind saying that again?

Q. You stated that after you heard what you did from Dr. Draeger in 1939, that you were not so much in favor of the Party any more; you stated that in your statement, isn't that so?

A. Well, I wasn't in favor at all before, either before that even; all I did was make an application to get some money what was coming to my wife in Germany.

Q. Did you have to be a member of the Party to get your estate?

A. That is what I got told.

Q. Who told you that?

A. Miss Aubrey.

Q. When you went to register the first time to apply for membership, they asked you for the names of two persons in the United States, didn't they, as sponsors? Didn't they?

A. No, sir, they did not.

Q. Didn't you give Marie Aubrey's name as one of the sponsors?

A. She put down her name, yes.

Q. And what other name did you give as a sponsor?

A. None other name at all.

Q. Did they ask you for the names of any sponsors in Germany?

A. Yes, they did.

Q. What names did you give as sponsors in Germany?

A. I gave two neighbors from where I came from.

Q. Mr. Mayer, when you signed your application you were told, and you read from the application, that you were free of Jewish blood; that you were free of Negro blood; that you didn't belong to the German-American Bund or

any other organization, and that you were going to be faithful to the Fuehrer. Isn't that so? You wrote that on the application.

A. It was not on the application.

[fol. 231] The Court: Did you read the application or did you just sign it blank?

The Witness: Yes, I read the application; was nothing like that in it.

The Court: What did it say?

The Witness: It was a different application at all.

The Court: Well, what did it say, to the best of your recollection?

The Witness: It stated the names and the birthdays and all that.

The Court: Name and address?

The Witness: Name, address.

The Court: An application for what, what did it say.

The Witness: For membership in the N.S.D.A.P., the Nazi Party.

By Mr. Stanziale:

Q. Let me ask you one more thing. You stated to Mr. Jackson and you stated to me before, that you voluntarily gave your membership card to Mr. Vogel; is that correct?

A. That's right.

Q. Now, here is what you said in your statement: "In December, 1940, I went to the Consulate to pay dues."

A. I did not.

Q. All right. "At this time Vogel took from me my membership card saying that they would keep it for me from then on. He also wrote out the answers I was to put on my 1940 Alien Registration form." Now, what you stated in this statement that you gave to the FBI agent is that true or is it untrue?

A. I did not state that he took my membership card, I gave it to him.

Q. Then, what you stated in the statement that you gave to the FBI agent is not correct; is that right?

A. I don't think that is in it like that.

[fol. 232] Q. You don't. Suppose you read it. Read it out loud, the first part.

A. Read it? "In December, 1940, I went to the Consulate to pay dues. At this time Vogel took from me my member-

ship card saying that they would keep it for me from then on."

Q. Go ahead.

A. "He also wrote out for me the answer I was to put of my 1940 Alien Registration form. The answers he wrote out for me were the answers I was to put to question number 10 and 15."

Q. Go ahead.

A. In answer to the question 10 I was told to put down "Reichsdeutschevereinigung, New York."

Mr. Stanziale: That's all. I have no further questions to ask this witness, your Honor.

Redirect examination.

By Mr. Jackson:

Q. I ask you again, Mr. Mayer, how long, how many hours of questioning, commencing with November the 22nd, did you have by the end of the next day, November the 23rd, how many hours did you have?

A. 10 hours.

Mr. Stanziale: Just a moment, I object.

The Court: He has answered "10 hours."

Q. Now, where were you, if you can recall the circumstances, when this document which is dated November the 23rd, 19——

The Court: What are you trying to do now, attack its admissibility? It is already in evidence.

Mr. Jackson: No, your Honor, I just wanted to know where he was when this was prepared if he knows.

A. Ellis Island.

[fol. 233] The Court: It has been testified to not once but five times by the agent and the witness himself.

Mr. Jackson: I don't care, your Honor, what the agent testified.

The Court: He just said Ellis Island. He said Ellis Island.

Q. Was this prepared after you went to Ellis Island, do you know this document.

A. After, yes.

Q. After?

A. That's right.
Q. Was it read to you?
A. Yes.

Mr. Stanziale: I press my objection, sir, if your Honor please, I think we are wasting an awful lot of time.

The Court: He is just strengthening your case. It is a waste of time. But if Mr. Jackson wants to build up your case I shall allow it.

Mr. Stanziale: Very well, Judge Meaney.

Mr. Jackson: I only wanted, your Honor, to bring out the fact that this man had reached the stage when he did not know what he was doing.

The Court: Well, you are at the wrong time to do that because you have admitted it in evidence and I have ruled that it was a voluntary statement.

Mr. Jackson: It was admitted into evidence, your Honor, but not with my consent. Of course, I objected to it going in.

The Court: No, you didn't object to its going in on the ground it was involuntary.

Mr. Jackson: I also, your Honor, please, called your attention to the fact that the things said by the witness Mr. Bell did not correspond with all of those; and furthermore, none of the things which he testified, as I remember, were in this statement.

[fol. 234] The Court: Well, we have gone through that before.

Q. I want to just ask you one question if I may.

The Court: Make it one.

Q. (Continuing:) When this was read to you, what was your state of mind; what was your physical condition?

The Court: I will sustain the objection.

Mr. Stanziale: Objected to.

The Court: I will sustain the objection.

Q. Tell us what the circumstances were.

The Court: No, we have been through all that, we are not going through it again, the statement is in evidence and the time for trying to show it was involuntary has gone by.

Mr. Jackson: All right, your Honor, I am through with it.

The Court: Mr.—I don't think I eat these things myself but somebody does—Mr. Lordi.

You have some other witnesses, have you?

Mr. Jackson: I have Mrs. Mayer I want to put on the stand and one other thing, the character witnesses—will you put them on now or later?

The Court: You may choose your own time.

Mr. Jackson: Well, your Honor, I have asked them to come. May I have your permission when they come?

The Court: Yes, we will put them on in or out of order. Step down.

Mrs. Mayer.

[fol. 235] MARIA MAYER, called and sworn on behalf of the defendant Mayer, testified as follows:

Direct examination.

By Mr. Jackson:

Q. You are the wife of Mr. Mayer, who just left the witness stand?

A. Yes, sir.

Q. And will you confirm that the testimony he gave about your coming from Germany in 1923—Is that the time you came?

A. Yes.

Q. And you were married?

A. Yes.

Q. You had no children at that time?

A. No.

Q. Now you have two children?

A. Yes.

Q. Are they in court?

A. One is, my girl is in court.

Q. The other?

A. At home.

Q. Your husband is in business in East Rutherford, is that correct?

Mr. Stanziale: Your Honor please——

A. Yes.

Mr. Stanziale: Your Honor please, if the purpose of calling Mrs. Mayer is to show he is in business and has two children——

The Court: It is now in evidence that he is married, has two children both born here, that he is in business in East Rutherford. What else do you want to ask her?

Mr. Jackson: I want to ask her about the death of her father in 1935.

The Court: Were you to get some money from your father's estate in 1935?

The Witness: Yes, sir.

Q. Did you get any money then?

A. No, sir.

[fol. 236] Q. What did you get, did you get a notice?

The Court: A Fuehrer raspberry.

Mr. Jackson: I didn't hear that.

The Court: Skip it.

Q. When did you get a paper from the other side?

A. My father died in 1935, I received these papers in January, 1936.

Q. What papers did you receive?

A. The will and some stipulations what was——

Q. And when you got them what did you do with them?

A. I took them to the German Consulate.

Q. Did you go alone?

A. No, I had Miss Aubrey along.

Q. Did she work for you then?

A. Yes, she worked in my house.

Q. You took her with you?

A. Yes.

The Court: What did your husband do? I don't care about her father's estate; her father's estate isn't being settled here.

Mr. Jackson: Your Honor, we want to show and want it to be clear to the Court and jury, that these matters were taken up with the German Consul and that those were the reasons why the husband went down there later.

The Court: Did you go with your husband to the German Consulate?

The Witness: No, sir, I took Miss Aubrey along, she was very familiar down there.

The Court: Were you with your husband there?

The Witness: No, sir.

Q. When you came back from the German Consul did you talk with your husband about the will and what you had done?

[fol. 237] Mr. Stanziale: I object to what she told her husband.

The Court: I think he has testified he did and she was never down there with him. She knows nothing about the circumstances.

Mr. Jackson: But she does know the circumstances under which he went there.

The Court: He went there, he says himself—and that is the only evidence so far—because this Miss Aubrey said he wouldn't be able to get any money out of Germany unless he was a Party member.

Q. Did Miss Aubrey tell you that too?
A. Yes.
Q. Alone or in company with your husband?
A. In company with my husband.
Q. Did she tell you about any experience she had with the same kind of trouble?

The Court: I won't hear that.
Mr. Stanziale: Just a moment, please.
The Court: Patently improper.

Q. Did you ever get any response from the German Consulate after you took these papers down?
A. I got informed later that a protest was filed in Germany in the court.
Q. But did you ever get any further——

The Court: We are not trying her.

Q. Did you ever attend any of the meetings, of the functions like moving pictures?
A. No.

The Court: She is not on trial.

[fol. 238] Q. Did your husband, as far as you know, ever attend any meetings of the Nazi Party?
A. No, sir.
Q. How do you know that?
A. Because he never went out alone.
Q. You always went together?
A. Yes, sir.

The Court: Four years, and he never went out alone!
The Witness: No, sir, I can even prove that. My husband was very sick and that is why I was always mit him.

Q. What about your husband?
A. Was always sick and I always went with him.

The Court: Did you go to the German Consulate with him?

The Witness: I sat downstairs in the car while he went up.

Q. So that while you didn't go up, you went there with him?

A. Yes, sir.

The Court: You don't know any more than that.

Q. With respect to this business, do you do anything with the business?

The Court: Mr. Jackson——

Q. That's all.

Mr. Stanziale: The Government has no questions to ask, your Honor.

Mr. Jackson: Miss Mayer, will you take the stand.

The Court: Miss Mayer.

[fol. 239] Gloria Mayer, called and sworn on behalf of the defendant Mayer, testified as follows:

Direct examination.

By Mr. Jackson:

Q. You are the daughter of Mr. and Mrs. Mayer, Mr. Mayer being one of the defendants here?

A. Yes, sir.

Q. How old are you?

A. Eighteen.

Q. Were you at your home in November I think it was, 1943, when Mr. Bell came there?

A. I was.

Q. Who else came with him on that occasion?

A. Another agent, Mr. Breen.

Q. And were you present during any of the time when they were talking and asking questions of your father?

A. Yes, sir.

Q. What did Mr. Breen do, if you remember?

Mr. Stanziale: I object, your Honor, we have been all through this.

The Court: What are you trying to show, what do you want to prove?

Mr. Jackson: I am going to ask her about Mr. Breen searching the house and she went with him.

The Court: What difference does it make?

Mr. Jackson: Well, I don't know that it makes any difference, I just want that fact before us.

The Court: Well, you might want a lot of facts before us and it doesn't make any difference, I assure you they will not be before us. The only testimony here is that he consented to the search. Is it contended that it wasn't by consent?

Mr. Jackson: No.

The Court: What do you want to prove by her?

Mr. Jackson: Well, she mentioned to me the fact that she went through, and then she took——

[fol. 240] The Court: What difference does it make?

Mr. Jackson: Made up a suitcase and they took it away from her.

The Court: I won't hear it.

Q. Tell us about your father, just a little bit. Did you know anything about the Nazi Party in 1936; are you able to remember that?

A. No, I am afraid not.

Q. Tell us about your father.

The Court: Is he a good father?

The Witness: Yes, sir.

Q. Do you remember about when this brother of yours was born?

A. In 1936.

Q. Now, can you remember whether or not your father was out or not out at all, after the birth of that boy?

A. No he wasn't, because we had quite a bit of trouble with him being sick and having an operation.

Q. And he is in invalid now, as you know?

A. Yes.

Q. And during the entire eight years that you speak of, that is his entire life?

A. That's right.

Q. They have been obliged to be very close and take care of him that way?

A. Yes.

Cross examination.

By Mr. Stanziale:

Q. Have you ever been to Camp Nordland?

A. Yes, once.

Q. What year?

A. Oh, that I don't remember.

Q. 1938, wasn't it, you spent two weeks up at Camp Nordland?

A. Well, I know I went to Camp Nordland, I did not spend the full time I was supposed to be there because I didn't like it.

[fol. 241] Q. How long did you stay?

A. I think a little less than a week.

Q. You went up there with your father's consent?

A. Yes, sir.

Re-direct examination.

By Mr. Jackson:

Q. Where is this Camp Nordland?

A. It is in New Jersey.

Q. Where?

A. The northern part, that's all I remember.

Re-cross examination.

By Mr. Stanziale:

Q. It was a camp run by the German-American Bund, wasn't it?

A. I don't know.

Q. Sure of that?

A. Yes; I was only a youngster and I don't remember.

Q. Very well.

The Court: Now, Mr. Azzoli has asked the Court if I would permit him to call some character witnesses for his clients, who will not be available at any other time. We

will recess for five minutes and then I think probably we will be able to extend him that courtesy.

(A short recess was taken.)

Mr. Jackson: I have one witness here, your Honor, one character witness.

The Court: Oh, you finish yours first.

Mr. Jackson: It will not be very long.

The Court: What I am trying to do now is oblige counsel in so far as I can, so if character witnesses will not be able to return tomorrow we will hear them, but I won't interrupt your case.

[fol. 242] Mr. Jackson: Your Honor, I wanted to explain to you that I could only get one.

The Court: Well, you can call others tomorrow.

Mr. Jackson: All right, sir. Then I will call the one who is here now.

* * * * * * *

Tuesday, December 5, 1944, 10:30 A. M.

[Case Continued.]

(Appearances as before.)

The Court: All right, gentlemen. You may proceed. Mr. Jackson has called his defendant, and Mr. Lordi, have you called yours yet?

Mr. Lordi: No, I haven't.

The Court: Do you wish to?

Mr. Lordi: Yes, your Honor.

Fritz Gustav Rudolph, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Lordi:

Q. Mr. Rudolph, where do you live?

A. 231 Harding Avenue, Teaneck.

Q. Do you mind raising your voice so that the jury and the judge can hear you?

A. 231 Harding Avenue, Teaneck.

Q. How long have you lived there?

A. About eight years.
Q. Eight years?
A. About eight years?
Q. When did you come to this country from Germany?
A. 1930.
[fol. 243] Q. 1930?
A. Yes, sir.
Q. And how long did you stay here?
A. Up until 1934.
Q. 1934?
A. Yes, sir.
Q. And then where did you go?
A. I went back for a visit to Germany.
Q. What was your reason for going back?
A. My mother was very ill.
Q. And did you go back?
Q. The same year.
Q. The same year?
A. Yes, sir.
Q. And where did you come to live when you came back?
A. I beg your pardon.
Q. Where did you come to live when you came back?
A. New York.
Q. In New York?
A. Yes, sir.
Q. And how long did you live in New York?
A. About 1936.
Q. When did you get married?
A. 1934.
Q. And you are still married now?
A. Yes, sir.
Q. And are you living with your wife?
A. Yes, sir.
Q. Are there any children born of the marriage?
A. Three.
Q. Three children?
A. Yes, sir.
Q. And how old are they?
A. Nine, seven and three.
Q. And you are now living in Teaneck?
A. Yes.
Q. Are you presently employed?
A. Yes, sir.

Q. And where do you work?
A. H. W. Kerr and Son.
Q. Where is that located?
A. Teaneck.
Q. And how long have you been working there?
A. Since April, 1943.
Q. And was your boss in court yesterday?
A. Yes.
Q. Testified in your behalf?
A. Yes, sir.
Q. Mr. Rudolph, I show you a statement dated November the 17th, 1943, and a statement dated September the 5th, 1944, and ask you if these statements were signed by you?
A. They were.
[fol. 244] Q. And which statement expresses correctly exactly what took place?
A. The last one.
Q. Indicating the statement of September 5, 1944; is that correct?
A. Correct.
Q. In other words, so far as the statement of September the 5th, 1944, is concerned, that is the truth as to what actually took place; is that correct?
A. Correct.
Q. That is the Alien Registration form which you filled out, is that correct?
A. 1940, yes.
Q. And when you answered question ten and question fifteen as you did, "None" and "Have not" what was your reason for answering it in that way?

Mr. Stanziale: I object, if your Honor please.
The Court: Well, the fact of the matter is that he did answer it that way and his reasons don't seem to be particularly material.
Mr. Lordi: It is all right, your Honor. I withdraw the question.

Q. Mr. Rudolph, do you have any folks in Germany?
A. Yes, sir.
Q. What folks do you have in Germany?

Mr. Stanziale: I object, if your Honor please, as immaterial to the issue.

Mr. Lordi: Your Honor please, it is very material in view of the fact—it is very material to my case. I want to indicate and the statement itself will set that out, the fact that the reason why he attempted to get into this organization——

The Court: Is it in the statement?

Mr. Lordi: It is in the statement, your Honor. Unless you want——

Mr. Stanziale: The first or the second statement?

[fol. 245] Mr. Lordi: The second statement.

The Court: If it is in the statement you may proceed briefly.

Mr. Lordi: He is right, your Honor. It is not in the statement, but my only reason for wanting to introduce it at this time is to indicate the reasons for doing certain things. However, if you——

The Court: Well, the basis of this accusation, Mr. Stanziale, is conspiracy, and in order to show the conspiracy there must be a meeting of the minds and a common concert. Now, if this man is able to give evidence it would be indicative of something which led him to do this, independently and not as a result of any agreement entered into, I think it might be material.

Mr. Stanziale: I withdraw my objection.

The Court: For that reason I will allow it.

(The question was repeated by the reporter.)

A. I have four brothers and three sisters.

Q. And are they connected with the Government in any respect?

A. Three are Government employees.

Q. Government employees?

A. Yes, sir.

Q. And did they in any way influence you as far as signing this Alien Registration form is concerned?

A. Would you mind asking your question again?

Q. Did they influence you in any way—the fact that they lived in Germany and were employed by the Government, influence you in any way so far as the Alien Registration form is concerned?

A. Yes. I was afraid if I don't do it it is going to be——

Q. You were afraid if you don't do what?

A. Going to be some harm for them.

[fol. 246] The Court: You were afraid that if you told the truth in your report to the United States Government, in a report which the United States Government was requiring of you, that that might hurt your relatives in Germany and——

The Witness: My relatives in Germany and my children over here.

The Court: And your children here?

The Witness: Yes, my family.

Q. And was that also the reason why you attempted to get into this organization?

A. Yes, sir.

Q. I show you exhibit G-8 and ask you if you ever received that from the German Consul?

A. No, sir.

Mr. Lordi: Exhibit G-8 is the membership card, ladies and gentlemen of the jury.

Q. Now I show you exhibit G-9 which is a green card which is given by the German Consul, I believe, so that you can get your dues book, is that correct, Mr. Stanziale? Do you remember receiving this?

A. No, sir.

Q. Now, I show you exhibit G-10 which is membership book and ask you if you ever received this?

A. No.

Q. Now, exhibit G-6 which sets forth the fact that you are not a member of any Rotary Club, did you ever receive this?

A. This one I couldn't say.

Q. You don't know?

A. No, sir.

Q. Did you ever receive exhibit G-7 indicating that you are a member of the National Socialist Workers' Party?

A. No.

Q. Did you ever receive this exhibit G-5, an application form certifying that you are not a member of the German American Bund?

A. No, not to my knowledge.

[fol. 247] Q. Did you ever meet Draeger?

A. No, sir.

Q. Do you know Mr. Draeger?

A. No.

Q. Did you ever enter into any plan whatsoever with anybody other than yourself to put a wrong answer in your Alien Registration form?

A. Never.

Q. What's that?

A. Never.

Q. Do you know any of the men who are on trial today?

A. No.

Q. With you?

A. No.

Q. Or any of the people who are mentioned in the indictment presented against you?

A. I never come in contact with anyone before the registration in 1941.

The Court: How about Draeger?

The Witness: I never know him; I never saw him.

The Court: How about Vogel?

The Witness: I saw Vogel once.

Q. And where did you see Vogel?

A. In the Consul's.

Q. In the Consul's office?

A. Yes.

Q. Is that at the time that you made your application?

A. No, sir.

Q. When did you see Vogel?

A. I saw him once when I paid my dues.

Q. And did you ever agree or consort with anyone to sign the Alien Registration form as you did?

A. No.

Q. Now, when the F. B. I. came to your house did you cooperate with them?

A. I beg your pardon?

Q. When the F. B. I. came to your house, when did that occur, when they came to your house for the first time, approximately?

A. I couldn't say, the first time.

Q. When they came to your house the first time did they search your house?

A. Yes, sir.

Q. Did you give them permission to do so?

A. Yes, sir.

[fol. 248] Q. And did they find anything in your house?

A. They took some items away.

The Court: What was that?

The Witness: They took some items away.

Q. You don't know what those items were?

A. I recall one item I had—it was paper clippings from Germany where I was bicycle racing and where I won races and champions. I clipped them out and took them with me. That's what the F. B. I. took.

Q. That is the only thing they took away?

A. And they had a picture where I was photographed with the railroad employees.

Q. Did they take anything else?

A. Not that I recall.

Q. Now, have you made application for citizenship in this country?

A. I made my intention for declaration.

Q. You filed your declaration of intention?

The Court: When?

The Witness: Two weeks ago.

The Court: How long have you been in this country?

The Witness: 1930.

The Court: You made your first application two weeks ago?

The Witness: Yes, sir.

Mr. Lordi: Your Honor please, I guess that's about all.

Cross-examination.

By Mr. Stanziale:

Q. Mr. Rudolph, did I understand you to say correctly that the first statement that you made to the F. B. I. on November the 17th is not a correct version of your case and that the second one that you made on September the 5th of 1944 is the correct one?

A. Yes, sir.

[fol. 249] Q. I see. Now, you made an application to become a member of the Nazi party, didn't you?

A. Yes, sir.

Q. And that was in 1935, wasn't it?

A. No.

Q. What year was it?

A. 1939.

Q. 1939?

A. Correct.

Q. You are sure it wasn't 1938?

A. It could have been '38 or '39, I cannot recall that. The statement is in my statement.

Q. When did you go there?

Mr. Lordi: I am going to object to this line of questioning, the statements, I believe, speak for themselves.

The Court: Yes, but you see he has made two statements and they don't agree. I think it is perfectly proper for the United States Attorney to cross examine him and find out what the truth is.

Q. Who did you go there with?

A. Alone.

Q. Alone?

A. Yes, sir.

Q. Did anybody ask you to become a member of the Nazi Party?

A. To a certain extent.

Q. Who was it, who asked you to become a member of the Nazi Party?

A. Well, I got some letters from the other side.

Q. From whom?

A. From my relatives.

Q. How close were they?

Mr. Lordi: Mr. Rudolph, would you mind raising your voice?

Q. Which relatives, brothers?

A. My mother.

Q. Your mother urged you to join the Nazi Party?

A. Yes.

Q. How many brothers have you in Germany?

A. Three.

Q. Are they members of the Nazi Party?

A. No, sir.

[fol. 250] Q. They are not?

A. No.

Q. Can you tell us why your mother wanted you to belong to the Nazi Party?

A. She receives pension from the Government.

Q. When did your mother ask you to become a member of the Nazi Party, what year?

A. Oh, about——

The Court: You say your brothers are not members of the Nazi Party?

The Witness: No, sir; I mean official members of the Nazi Party.

The Court: Well, why was it necessary for you to be a member in order to protect them in Germany if they were not members? Why didn't they join up themselves and protect themselves?

The Witness: They are Government employees since 1922.

The Court: They are Government employees and not members of the Nazi Party.

The Witness: Since 1922.

The Court: Were they Government employees since 1933?

The Witness: Yes, sir.

The Court: A. H.—after Hitler?

The Witness: Yes.

The Court: And they still weren't members of the Nazi Party?

The Witness: One was policeman and two were Government employees.

Q. Can you tell us when your mother requested you to belong to the Nazi Party in the United States?

A. I couldn't recall the exact year.

[fol. 251] Q. Was it not the year of 1938 or 1939?

A. Maybe '37, '38.

Q. You came in this country in 1930?

A. Correct.

Q. And you say that because your mother asked you to belong to the Nazi Party, although you had been here since 1930, that is why you made the application?

A. Yes.

Q. You paid dues to the Nazi Party up to what year?

A. Two months before Pearl Harbor.

Q. You paid dues up until, would it be safe to say in the month of September or October of 1941, is that correct?

A. About correct. I couldn't recall how many months.

Q. Now, how did you pay these dues, personally or did you send it in by mail?

A. Personally.

Q. You went every month?

A. No, sir.

Q. How many times a year would you go down to the German Consulate to pay dues?

A. I went about three times.

Q. Three times a year?

A. Three times altogether.

Q. What did you do, pay the dues in advance?

A. No, I was always behind.

Q. You received letters from the German Consul, didn't you, inviting you to parties and social functions?

A. Correct.

Q. And you also received from the German Consulate or from the German Library of Information propaganda books, didn't you?

A. Correct.

Q. You received a book which was known as "Polish Atrocities" didn't you?

A. I couldn't recall that.

Q. You also received a book, or you received other books known as the "Facts in Review," didn't you, from the German Consulate?

A. I wouldn't say for sure.

Q. Well, what propaganda material did you receive from the German Consulate after you became a member?

A. I wasn't a member.

[fol. 252] Q. When you were an applicant for membership, what did you do?

The Court: When you were a due-paying applicant?

The Witness: Yes, sir.

The Court: What did you get?

The Witness: It was no propaganda at all.

The Court: What was it?

The Witness: It was——

The Court: Grimm's Fairy Tales?

The Witness: No, it was history about old cities and old German history.

Q. Did you receive any books on the history of the Nazi Party?

A. No, sir.

Q. Didn't receive any?

A. No, sir.

Q. Now, in 1940 in the month of either September or October, you went to the German Consulate, didn't you, in connection with your Alien Registration?

A. No.

Q. You didn't?

A. No.

Q. Did you talk to anybody at the Consulate's office in connection with your Alien Registration?

A. No.

Q. And weren't you advised by a member of the Consular Staff to deny that you were a member of the National Socialist Party?

A. Never.

Q. Now, you signed a statement on November the 17th which is identified as exhibit G-67. Will you read the last paragraph of the statement?

A. "At the time of the first Alien Registration in 1940 I was advised and counseled by the officials at the German Consulate, New York City, to state on my registration form that I was not a member of this National Socialist German Workers Party. They stated that if anything happened to [fol. 253] just deny membership in the Party. They gave no further explanation that I recall."

Q. Now, when you signed this statement and made this statement to Samuel T. Dunn, F. B. I. agent and Donald Rosen, wasn't that the truth?

A. No.

Q. Then what you stated there was not the truth?

A. No, sir.

Q. Then why did you make such a statement to the F. B. I. agent?

A. Well, I must have been excited and I want to get it off my chest.

Q. What did you want to get off your chest?

A. Well, that I was affiliated with that organization.

Q. And you were willing then to tell a falsehood in a statement?

A. Yes, sir, I must have been excited when I said that.

Q. Now, you had a member card, didn't you?

A. No, sir.

Q. And isn't it a fact that when you went to the German Consulate and were advised by them, that you later burned this membership card?

A. No, sir.

Q. Well, let's see what you have in your statement about that. I ask you to read the third paragraph.

Mr. Lordi: Is that the first statement?

Mr. Stanziale: Yes.

Q. Please read it.

A. Which one?

Q. The third paragraph, here.

A. This one?

Q. Yes.

A. From the beginning to the end?

Q. The paragraph.

A. "Some time around March of 1938 I went to the German Consul's office in New York City. While there I made an application for membership in the National Socialist German Workers Party which I knew to be the official Party of the German Government at that time. I received a yellow book as evidence of my having filed this application and [fol. 254] as a record of the dues that I paid. At that time I paid the first dues. I no longer have this book, having burned it shortly after receiving news through the Swiss Legation that my mother and brother in Germany had died."

Q. Now, you stated in there that you burned the book. What did you mean by that?

Mr. Lordi: If your Honor please, that yellow book that he talks about is not a membership book, it is only evidence that he paid his dues.

The Court: Well, as I understand now, he denies that he burned any book.

Mr. Stanziale: Yes, and he denies that he burned the card. I asked him if he had a card.

Mr. Lordi: I just want it understood that the type of book it was is not the book that the United States Attorney would lead the jury to believe.

The Court: All right, it will be so noted.

Q. You had a card on which the dues, the stamps, were placed on the back, didn't you?

A. No, sir.

Q. Well, didn't you get any stamps for the dues that you paid?

A. No, sir.

Q. Well, what did you mean by the statement to the F. B. I. agent that you burned the book or the card, whatever you care to call it?

A. I received the yellow book when I went there.

Q. The yellow book?

A. The yellow book and that book was only how to conduct myself as a gentleman when I went over there.

Q. Oh, you got a book as to how to conduct yourself as a gentleman. Who gave you this book?

A. Up in the Consul's office.

Q. And this book was given to you when you applied for membership in the Nazi Party?

A. Yes.

[fol. 255] Q. Then why did you have to burn this book if it was a book on how to conduct yourself as a gentleman?

A. I want no part any more as soon as I received word that my mother died and my brother got killed in action.

Q. That's why you burned it?

A. Yes.

Q. And in 1940 you signed your registration form that you were not a member of any organization, isn't that right?

A. Correct. That is 1940?

Q. 1940?

A. 1940.

Q. And you also signed question number fifteen that you were not active or affiliated with any organization devoted in whole or in part to a foreign government, is that correct?

A. Correct.

Q. Well, up to either the month of September or October of 1941, nearly a year after you signed this Alien form you paid dues to the German Consulate, didn't you?

A. May I ask you——

Q. I will repeat the question. In 1940, to be exact on the 3rd of December, you filed a form under the Alien Registration Act?

A. Yes, sir.

Q. And in that form you stated that you were not a member of any organization?

A. Yes.

Q. And that you were not connected with any organization that was concerned with a foreign government?

A. Yes.

Q. Yet from your own testimony you have testified that as far back as September or October of 1941 you had continued to pay dues to the German Consulate in connection with your membership, or application for membership, in the Nazi Party. Now, why did you continue to make your payments?

Mr. Lordi: Your Honor please, I am going to object to that question. In the first place it is a little too long and I doubt whether the witness understands it.

[fol. 256] The Court: Let's see.

Mr. Lordi: In the second place, I think he has already answered it.

The Court: Let's see. Can you divide your question, Mr. Stanziale?

Mr. Stanziale: Yes, your Honor.

Q. Why did you continue to pay dues to the German Consulate after you had filed your application on December the 3rd 1940 that you were not a member of the organization?

Mr. Lordi: It is not an application, your Honor.

The Court: What was it?

Mr. Lordi: He says he filed his application in September 1940.

Mr. Stanziale: I mean his application with the Nazi Party, sir.

The Court: No, no. Did he continue after he filed his registration; is that your question?

Mr. Stanziale: Yes.

The Court: Why did you keep on paying dues after you registered as an alien?

The Witness: Why?

The Court: Yes.

The Witness: I don't know how to answer it, your Honor.

The Court: Well, I don't know either.

Q. Can you answer that question?

A. No.

Q. You cannot answer it?

A. No.

Q. All right. Isn't it a fact that in 1938 you attended a Christmas party given by the German Consulate at the Turnhall in New York?

A. Correct.

Q. And isn't it also a fact that you attended a German memorial service in 1939 given by the Consulate at the [fol. 257] Turnhall also?

A. Correct, for Von Hindenburg.

Q. For Von Hindenburg?

A. Correct.

Q. And isn't it a fact from the period of 1938 when you first filed your application for membership up to and including the period of immediately before the month of June of 1941, that you received invitations from the German Consulate to attend their party functions?

A. Some of them.

Q. And isn't it also a fact that in the month of April, 1940, you attended Hitler's birthday party?

A. No, sir.

Q. Did you attend Hitler's birthday party in 1939 in April?

A. No, sir.

Q. What party did you attend to in the month of April, 1940?

A. None.

Q. When was the last party that you attended given by the German Consulate?

A. I cannot recall which one; either Christmas party or memorial for Von Hindenburg. Those are the only two parties I ever went.

Q. Did you attend Christmas party given by the Consulate in December, 1940?

A. I only went once.

Q. Was it in 1940?

A. I couldn't say, '39 or '40, I couldn't say that. That's the only two parties I ever went, the Christmas party and the memorial to Von Hindenburg.

Q. When you filed your Alien form of 1942, in that form you failed to state that you had made application to the Nazi Party, isn't that so?

A. Correct.

Q. And even in that statement you had failed to state that you were affiliated with the Nazi Party?

A. Correct.

Q. So that in two instances in the form of 1940 and in the form of 1942 you were asked the same question in the same manner?

A. Correct.

Q. And on September the 5th of 1944, of this year, you now state that you received no instructions from the German Consulate as to how you should answer your questions, [fol. 258] is that right, your second statement?

A. December the 5th?

Q. No, September the 5th.

A. September. I understood December.

Q. September the 5th.

A. September the 5th, that is correct.

Q. Did you talk to anybody before you decided to give any statement that you did not receive instructions from the German Consulate?

A. No, sir. Mr.—special agent Mr. Rosen told me I should come down to the F. B. I. building and I made that statement.

Q. That was on September 5th of this year?

A. Correct.

Q. Now, if special agent Rosen had not called you would you have made the statement or would you have rested on the first statement?

The Court: I think that is more or less speculative, Mr. Stanziale.

Mr. Stanziale: Very well, your Honor, I withdraw the question.

Q. At the time that you filed your form in 1940 you knew that you weren't telling the truth, isn't that so.

Mr. Lordi: I object.

A. Correct, to a certain extent.

Q. Well, what extent?

A. Well, I was not a member, and as far as I understood the question asked if I was a member of a certain political party and I wasn't.

Q. You went to the German Consulate, didn't you?

A. No, sir.

Q. You deny that?

A. Not in regard to that question.

Q. Oh, you didn't go for the form, for the Alien form?

A. I said that before I went to the Consulate to pay my dues.

[fol. 259] Q. And when you went to pay your dues in September of 1940, you didn't talk to them at all about how you should file your Alien form?

A. No, sir.
Q. You didn't ask him any questions?
A. No, sir.
Q. And he didn't tell you how you should answer it?
A. No, sir.
Q. That's all.

Mr. Lordi: I have already put in my character witnesses.

* * * * * * *

FERDINAND FISWICK, a defendant herein, called and sworn on his own behalf, testified as follows:

Direct examination.

By Mr. Pearse:

Q. Mr. Fiswick, you are one of the defendants in this case, are you not?
A. Yes.
Q. And you were born in Germany?
A. Yes.
Q. And when did you come to the United States?
A. January, 1929.
Q. And did you ever return to Germany?
A. Yes.
Q. On how many occasions?
A. I was there 1932 and 1937.
Q. And in 1932 when you went back what was the purpose of your trip?
A. To see my sick father, who died one year later.
Q. And how long were you there in 1932?
A. For four months.
Q. That was before the advent of Hitler into power was it not?
A. Yes.
Q. You came back to the United States you say and then when did you go back to Germany?
A. 1937.
[fol. 260] Q. And what was your purpose in returning on that occasion?
A. In the meantime I had married, to see my parents-in-law.

Q. You had married?
A. Yes.
A. And whom had you married?
A. My wife.
Q. Well, I mean, was she in Germany or in the United States?
A. She was in the United States.
Q. When you say to see your parents-in-law, were they in Germany?
A. Yes.
Q. So you made a trip with your wife?
A. Yes.
Q. How long were you there at that time?
A. Three months.
Q. And you returned again to the United States?
A. Yes.
Q. And have been here ever since?
A. Yes.
Q. While you were in Germany, either in '32 or in '37, did you join any organization there of any kind?
A. No.
Q. Or take any part in any organizations' activities in Germany?
A. No.
Q. When you lived in Germany what political party did you belong to?
A. Before 1929 I belonged to the Catholic Central Party.
Q. That was the time that you were living in Germany and before you came to the United States?
A. Yes.
Q. You are a Roman Catholic by faith, are you not?
A. Yes.
Q. Now, did you ever have a mind to return to Germany to make a home, your home there?
A. Yes.
Q. When?
A. In the year of 1939.
Q. And what did you do about it?
A. I was married and my wife became sick in 1939 and after consultation with the doctor, she had to be operated on a little later and I told her it would be better to secure a place for her in Germany; and I went to the German Consulate and asked if it would be advisable for me to apply [fol. 261] for membership in the Nazi Party, to eventually,

if I had have to go back to Germany, join the Party in Germany.

Q. You were in business here, were you not?

A. Yes.

Q. And what was your business?

A. I had a grocery and delicatessen store.

Q. And where?

A. In Union City.

Q. And your wife is still there running the store, as far as you know?

A. Yes.

Q. And had you received any offers from anyone in Germany to establish you in business over there before you went to see the Consul?

A. Yes, I had some opportunity to eventually exchange property in Germany with a refugee from Germany living in Union City.

Q. A person that you knew?

A. Yes.

Q. And did you consult any of your relatives in Germany with reference to it?

A. Yes; also my brother; my brother wished that I should go back to Germany and eventually go into partnership with him.

Q. He also was a former member of the Catholic Party, was he?

A. Catholic Party, yes.

Q. Do you know whether or not at the time your brother communicated with you he was a member of the Nazi Party?

A. No, he never was.

Q. You mean he never was?

The Court: But you were going to be, is that right?

The Witness: I didn't hear your Honor.

The Court: You were going to be a member of the Nazi Party.

Mr. Pearse: I am getting to that now.

Q. What did the German Consul tell you with respect to your giving up your business here and thinking of returning to Germany and establishing a business there; what did he say to you?

A. He said to accomplish this in an easier way it will be [fol. 262] best if I would join the Party and to put in an

application to have the right to become a member in Germany.

Q. Now, did you put in an application?

A. Yes.

Q. Do you recall when that was, Mr. Fiswick?

A. In the middle of August.

Q. What year?

A. In 1939.

Q. I show you Exhibit G-3 and ask you whether or not that is the form that you filled out; and look at it carefully to make sure whether it is or not?

A. Yes, that's right.

Q. And did you provide them with sponsors?

A. Yes.

Q. Two American and two German?

A. Yes.

Q. Whom did you give as your German sponsors?

A. I asked the Mayor of my city where I live to name two sponsors, because I didn't know friends of mine.

Q. Now, at the time you made this application did you have any intention to become a member of this Nazi Party in the United States?

A. No.

Q. Did you have any other purpose in making this application to become a member of the Party than in the event that you returned to Germany?

A. Only material purposes.

Q. Well, what was the purpose—you say material purposes?

A. To make better living in Germany or switch the property and in behalf of my wife, better.

Q. You were not imbued, of course, with the Nazi ideals, were you?

A. No.

Q. Ever have been?

A. Only partly.

Q. Imbued with their ideals?

The Court: What was that?

The Witness: Only partly.

Q. What do you mean by partly?

A. When the German Revolution was ended I thought that some of the young German unity would be better for

Germany; but I was not in favor of other things Hitler did and wanted to do.

[fol. 263] Q. You mean when he came in power, or after he was in power?

A. When he came in power.

Q. Did you pay any dues?

A. Yes.

Q. And did you pay an initiation fee?

A. Yes.

Q. And how much of an initiation fee did you pay, do you remember?

A. I guess about $5.

Q. There has been shown here in court various exhibits which seem to be membership books and membership cards and temporary cards. Were you given a temporary card?

A. Yes.

Q. I am just handing him this—I am not sure whether it is the right one or not. Is that the kind of card you got?

A. No.

Q. What color was it?

A. I do not recall it what the color is any more.

Mr. Pearse: May I show him the other one, Judge?

Q. Here is Exhibit G-9; would that be the one?

A. No.

The Court: Was it a receipt card?

The Witness: It was a receipt card.

Q. Oh, only the receipt card. And were you ever told that your membership was accepted in the Party?

A. No.

Q. Now, where were you living in September, 1940?

A. In Union City.

Q. And what did you do when you learned that it was necessary for you to register as an alien resident of this country?

A. I went to the German Consulate and asked Mr. Vogel what my status was about the registration, if I was connected or affiliated or a member of the Party, if I were stated as such.

Q. Had you ever met Vogel before?

A. Yes.

Q. How many times?

A. Two times.

[fol. 264] Q. Continue with the conversation as best you recall it.

A. Then I asked Mr. Vogel if I had to register and Mr. Vogel told me so members of the Party should register, but anwaeter, or applicants, they did not need to register because they were not members and not affiliated; in my case as long as I wanted to become a member in Germany only, I would not have anything to do with the Party as long as I did not go back to Germany to become a member.

Q. So in the statement, in filling out the statement, your item number 10—the statement reads, "I am or have been within in the past five years or intend to be, engaged in the following activities: In addition to other information, list memberships or activites in clubs, organizations or societies." You answered "None?"

A. Yes.

Q. Correct. Then in reference to item 15, "Within the past five years I either have or have not been affiliated with or active—in parentheses—a member of, official of or worker for—end of parentheses—organizations devoted in whole or in part to influencing or furthering the political activities, public relations or publ-c policy of a foreign government." You answered that "I have not." Correct?

A. Correct.

Q. Did you ever file any supplemental statement?

A. No.

Q. Did you ever go back to the German Consul's office to get any further advice?

A. No.

Q. Outside of the conversation which you had with Vogel at the time that you mentioned, did you ever confer or talk with any other person in the German Consulate or anyone else concerning this declaration that you had made or registration statement that you had made?

A. No.

Mr. Pearse: Will your Honor excuse me just a minute, please?

The Court: Not more than that.

[fol. 265] Mr. Pearse: I know, I am hurrying as fast as I can. I am an old man, Judge.

The Court: I could say you have young ideas, but I won't.

Mr. Pearse: No doubt about that.

Q. Did you receive from the German Consul any of these notifications, or invitations if you will, to various festivities sponsored by the Consul?

A. Yes, sir.

Q. What sort of stuff did you get?

A. Sometimes it was to festivals and they sent "Facts in Review."

Q. "Facts in Review." The young lady testified the other day that she sent out to certain people whose names appeared on a list, a request, a mimeographed request of the German Consul to call around about the time, September, 1940, when these registration statements were due. Did you get any such request?

A. Not that I recall.

Q. Then later on in the year, either before or after you filed your statement, did you receive any other request in like form?

A. No.

Q. Did you ever attend any of these festivities that have been referred to in this case?

A. No, never.

Q. You filed your statement, I see, on December the 4th; is that correct?

A. That is correct.

Q. I think that's all, sir.

Cross-examination.

By Mr. Stanziale:

Q. Mr. Fiswick, when did you enter the United States.

A. In January, 1929.

Q. '29. Did you make any return trips to Germany?

A. Yes.

Q. What year?

A. 1932 and 1937.

Q. Now, you returned in 1937 to the United States?

A. Yes.

[fol. 266] Q. You applied for membership in the Nazi Party in 1939?

A. Yes.

Q. While you were in Germany you did not apply?

A. No.

Q. I see. What prompted you to apply after you returned to the United States in 1939 to become a member of the Nazi Party?

A. Economical reasons and sickness of my wife.
Q. Did you intend to go back to Germany?
A. Yes.
Q. Why didn't you stay in Germany while you were there in 1937, why did you come back?

Mr. Pearse: I object. What's the difference why he didn't stay? He didn't stay.
Mr. Stanziale: I think I have the right——
The Court: What do you want to show?
Mr. Stanziale: Well, if he had no intention——
Mr. Pearse: His family was here, he went over just to meet his in-laws he said. There was no reason he should stay there.

Q. Did your family go with you in 1937?
A. My wife and I were together.
Q. Did you have anybody here that you had left in 1937?
A. No, only cousins.

The Court: The business?
The Witness: No, the business I had just bought; then I bought the business in February and came back in June, in the meantime somebody else was in it.

Q. Now, you paid dues up to when?
A. I paid dues—I guess the last time, in November, 1940.
Q. At the time that you made your application for membership in 1939 you stated or you were sworn to recognize [fol. 267] Hitler as leader of the German Reich; isn't that so?
A. Yes, to obey him.
Q. And you also stated that you agreed to obey the laws of the German Reich?
A. Yes.
Q. Now, from 1939 until 1940, when you were required to register, you received invitations to go to functions held by the Consulate?
A. Yes.
Q. Did you go to the German Consulate in reference to your registration yourself, or did you receive a card or a letter to come there?
A. I went myself.
Q. And you spoke to Vogel?
A. I spoke to Vogel.

Q. At the time that you went there, there were some other members of the organization present, weren't there?

A. Yes, it seems to be.

Q. Approximately four or five other persons?

A. Yes.

Q. When you spoke to Vogel, Vogel addressed all of you collectively, isn't that so?

A. No.

Q. Individually?

A. Yes.

Q. Now, at the time that you spoke to Vogel, Vogel stated to you, is it not so, that it was not necessary to state that you were a member of the organization?

A. Yes.

Q. Now, did he elaborate upon that?

A. I asked him "Then I am not connected with the Party then?" and he said to me, "No, you are not connected."

Q. But you were paying dues at that particular time?

A. Yes.

Q. And when you filed your registration you stated: "No clubs, none." Is that correct?

A. Yes.

Q. And then you further stated in question number 15: "I have not."?

A. Yes.

Q. Been affiliated. When was the last time that you were at the German Consulate's office?

A. Last time I guess in the Spring of 1941.

Q. 1941, after you had filed the registration?

A. Yes.

[fol. 268] Q. There was a meeting in the month of May, 1941, at the German Consulate's office, wasn't there?

A. I don't know.

Q. Well, there were other people present, weren't there?

A. Yes.

Q. And Dr. Draeger addressed the persons present, didn't he?

A. Not the meeting.

Q. Well, who addressed the meeting.

A. There was not a meeting as such, there were about four or five people in the room where Vogel worked. Mr. Draeger came to it.

Q. And what was said at that particular time, either by Vogel or Draeger?

A. As I recall, Mr. Draeger said that war eventually could be expected.

Q. With whom?

A. With the United States and Germany.

Q. Yes; and what, if anything, did he say should be done with the membership cards or identification?

The Court: When was that?

Mr. Stanziale: May, 1941.

The Witness: May, 1941.

Mr. Stanziale: This goes as to the continuing nature, your Honor.

Q. What was said by Draeger in connection with membership cards and identification with the Nazi Party, what should be done with the cards and the membership books?

A. He didn't give me any instructions about it.

Q. What did he say about it in your presence?

A. I don't recall what he said.

Q. Didn't he say that since war was coming with the United States, that all membership cards should be destroyed at that particular time?

A. I don't recall that.

Q. You don't recall that. And didn't you, further, that night when you got home, destroy your membership card?

A. I destroyed my membership card.

[fol. 269] Q. And didn't you destroy your membership card because of the instructions that you had received from Draeger that afternoon?

A. No.

Q. May I call your attention to your statement, sir, to refresh your recollection.

May I have his statement please?

(Statement handed to counsel.)

Will you read the last paragraph of this statement, please, the last paragraph, Mr. Fiswick, please.

A. "In April or May, 1941, I attended a meeting of the National Socialist German Workers Party at the German Consulate, 17 Battery Place, New York, at which time Mr. Draeger advised that the German Consulate was closing and that war was possibly coming; that all of the members should obey the laws of the United States and that we should destroy membership cards."

Q. Go further, the next paragraph.

A. "I destroyed my prospective membership card in the National Socialist German Workers Party at the time I answered"——

Q. "at the time I arrived."

A. "at the time I arrived home that night after attending this final meeting of the National Socialist German Workers Party."

Q. Very well. Does that refresh your recollection, Mr. Fiswick?

A. It does—it is not stated right.

Q. It isn't stated right?

A. No.

Q. What is stated wrong?

A. I have complained about it right away, as soon as I was in custody, that the statement taken by the FBI was distorted.

Q. You signed that statement?

A. I did, yes.

Q. And before you signed that statement you read it, did you not?

A. Yes.

[fol. 270] Q. Now, if you did not consider yourself a member of the Nazi Party, will you please tell me why you destroyed your application card?

Mr. Pearse: I object; in the first place he didn't destroy any application card; in the next place he didn't have any application card. He has testified that what he had a card for was one which indicated that he had paid some dues.

The Court: No, he said he destroyed his prospective membership card.

Mr. Pearse: Well, that's what it is called, but in the first testimony he said he never had one.

The Court: That's what he said in his statement.

Mr. Pearse: I understand that, but he said his application card.

The Court: All right, I am correcting it now to the prospective membership card.

Q. If you did not consider yourself a member of the Nazi Party or affiliated with the Nazi Party, why did you destroy your prospective membership card? Is that all right, Mr. Pearse?

A. When I went the last time to the Consulate in New York City I also told Mr. Vogel that I would, further, not be a member of the Party.

Q. That was after you had filed——

The Court: Why did you destroy the card?

The Witness: I destroyed the card not to have anything to do with it any more.

Q. That was after you had filed your Alien Registration form on December of 1940?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Isn't it a fact, isn't it a fact, Mr. Fiswick, that you destroyed your card in pursuance to other instructions re- [fol. 271] ceived either by Draeger or Vogel not to make known that there was in existence in the United States at that particular time a Nazi Party?

Mr. Pearse: Answer that yes or no, sir.

A. No.

Q. That's all.

Mr. Pearse: That's all, Mr. Fiswick. Mr. Hansen, I have had his reputation witnesses on—I had them on yesterday.

The Court: How many more have you? Two more, have you?

Mr. Pearse: No, sir, I have one more defendant and I have the wife of one of the defendants. I have two charming character witnesses.

The Court: One more defendant,—haven't you got two more?

Mr. Pearse: I have no further testimony so far.

The Court: Oh, testimony. All right, go ahead.

* * * * * * *

MOTION TO DISMISS THE INDICTMENT

Mr. Pearse: If the Court please, on behalf of all of the defendants in this case we desire to move to dismiss the indictment and for the direction of a verdict of not guilty as to all of the defendants, on the same grounds

that we advanced at the end of the Government's case, and on the further ground that as the indictment charges a conspiracy to defraud the United States by false answers to the statements required under the Act of 1940, the proof shows that if a conspiracy existed it was a conspiracy to commit an offense against the United States by violating that Act and not a conspiracy to defraud the United States. [fol. 272] And for that reason also we make the same motion.

(Argument of counsel on the motion.)

The Court: Motion denied. You may have an exception, which will be noted for all defendants.

(Which exceptions are hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

(Mr. Pearse further argued on behalf of the defendant Fiswick.)

The Court: I think the argument that you make is a proper one for the jury to consider but I do not feel that I should arrogate to myself the function of the jury.

Mr. Pearse: May I have an exception?

The Court: That ruling which I originally made will, of course, go for all the defendants and exceptions will be allowed for them. If there are any other individual motions to be made I shall request counsel, to be very brief, but I will be happy to hear them.

(Exception allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Pearse: Mr. Campbell has a motion to make with respect to striking a certain exhibit.

Mr. Azzoli: Before that is taken up, on this main motion——.

The Court: Have you anything further to add to it?

Mr. Azzoli: Only this as to the two defendants whom I represent.

[fol. 273] The Court: Wait a minute. If you are going to have further argument on that we will take it in order. We will take Mr. Hayden. Have you any further argument?

(Mr. Hayden further argued on behalf of the defendant Langenberg.)

The Court: I can find no reason for deviating from my ruling that I think it is a factual situation for the jury to determine.

(Further argument by Mr. Hayden.)

The Court: You may have an exception to my ruling.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

(Further argument by Mr. Azzoli as to the defendants Zimmer and Ulrich.)

The Court: You may have an exception to my ruling.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Azzoli: As to Ulrich we are in a very peculiar position, different from anyone else. It is admitted by his statement, and the prosecution has not changed it, that this man since 1929 had no connection with this organization whatever.

(Further argument by Mr. Azzoli.)

[fol. 274] The Court: What do you think about that, Mr. Stanziale, as far as Mr. Ulrich is concerned?

(Argument by Mr. Stanziale.)

The Court: I shall rule it is a question of fact, and deny your motion. You may have an exception.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

(Argument by Mr. Gechtman on behalf of the defendant Burchardt.)

The Court: I consider it a question of fact for the jury and you may have an exception.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Campbell: I have two types of motions and I will be very brief.

The Court: One is to strike from the record certain evidence, is it?

Mr. Campbell: Certain evidence.

The Court: What is that evidence?

Mr. Campbell: The first evidence I move to strike from the record is the statement of Koenig and the Alien Registration form filed by Koenig, because he is no longer a party, and as far as the other defendants are concerned it is pure hearsay.

The Court: That is the man as to whom I dismissed?

Mr. Campbell: That's right.

The Court: I shall grant that motion.

[fol. 275] Mr. Campbell: I move further to strike from the evidence all of the written statements made by any of the defendants which have been introduced in evidence which were taken subsequent to May 7, 1942, and that is all of them, on the ground that the taking of Nauert into custody on May 7, 1942 followed by the full and complete disclosure by him to the Federal Bureau of Investigation on the same date, his full disclosure to the Federal Hearing Board and to the Immigration authorities on Ellis Island in some thirty pages of questions and answers, constituted full and complete information and supplied any data not given on his 1940 Alien Registration and terminated his connection with the alleged conspiracy; and the statements of the co-defendants made subsequent thereto are inadmissible against the defendant Nauert, and without such statements, the Government has failed to produce sufficient evidence to warrant the submission of the case to the jury so far as Nauert is concerned.

The Court: Your first motion has been granted. The second is to strike Nauert's statement?

Mr. Campbell: No, sir. All of the statements made by defendants other than Nauert.

The Court: Statements made by defendants other than Nauert?

Mr. Campbell: Other than Nauert.

The Court: And you feel that Nauert's statement—What about that?

Mr. Campbell: That is an admission, your Honor, and I don't feel——

The Court: And you feel that on that ground alone the Government would not be entitled——

Mr. Campbell: I think so, sir, because there is a full and complete statement therefore which I think would [fol. 276] completely exonerate him and would leave insufficient evidence to go to the jury.

The Court: What have you to say about it?

(Argument of Mr. Stanziale against the motion.)

The Court: I shall grant the motion so far as Nauert is concerned, that the statements of all except himself will not be considered. Now, frankly, I am going to say this, sir, that I am not going to bar them from use against other defendants and they will be considered, and it is a practical difficulty which you are up against. You are winning, I am afraid, a Pyrrhic victory.

Mr. Campbell: May I be heard a little further on this ruling?

(Further argument of counsel.)

Mr. Campbell: My recollection is when the motion was made to strike out the various statements against the various defendants, I understood your Honor to say you would not let the case go to the jury in the event these statements were not admissible.

The Court: No, but his statement is admissible, it will go to the jury on his statement.

Mr. Campbell: I don't want a Pyrrhic victory, it *it* is quite vital, and I want to make myself as clear as I can. At the time that the case was argued at the end of the Government's case, it is my understanding that a motion was made against admission of these statements and I understood your Honor to say if there was nothing against the individual defendant, except what his statement said, plus what the Government introduced, that that would not be sufficient to convict him.

[fol. 277] The Court: Oh, no, you are quite wrong. If I had said that or that were my feeling, you would be out, but you misunderstood my ruling. I don't recall the exact words, but in effect the ruling was that these statements

were being admitted only against the individuals up to that point but not against the others unless there could be independent proof of the existence of conspiracy, because these statements were not to be produced as proof of the conspiracy; the conspiracy had to be proved *aliunde*. And I ruled that there had been sufficient evidence in my opinion from which the jury might infer the existence of the conspiracy without the use of the statement, and I may have said, "If the statements are all the Government has" that then they could not prove the conspiracy.

Mr. Campbell: I understood differently.

The Court: No.

Mr. Campbell: Then may I make a further motion with respect to the individual defendant, and that is that I now move that the indictment be dismissed against him and a verdict be rendered in his favor, upon the ground that the taking of Nauert into custody—and this is a motion for a direction of verdict—upon the further ground that the taking of Nauert into custody on May 7, 1942, followed by full and complete disclosure by him to the Federal Bureau of Investigation, his full disclosure to the Federal Hearing Board and to the Immigration authorities on Ellis Island in some thirty pages of questions and answers, constituted full and complete information and supplied all data or information not given on his 1940 Alien Registration form, and terminated his alleged connection with [fol. 278] the alleged conspiracy; and the statements of the co-defendants made subsequent thereto, which are all of them, are inadmissible against the defendant Nauert, and without such statements, the Government has failed to present such evidence as warrants submission of the case to the jury. I merely want to get that on the record.

The Court: Overruled. You may have an exception.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Campbell: And I join in the other motion made by Mr. Pearse.

The Court: And I have allowed you an exception to my ruling on that.

(Further argument by Mr. Stanziale.)

The Court: I have ruled on that, Mr. Stanziale, I don't want any academic presentation.

Mr. Lordi: My argument, your Honor, follows the same general line as I made at the end of the Government's case.

The Court: I shall presume that in addition to the argument made by Mr. Pearse generally for all defendants, you are moving with respect to your individual defendant, that the evidence does not warrant its going to the jury.

Mr. Lordi: That is correct.

The Court: I shall deny that motion and grant you an exception. You may have an exception to the general motion made by Mr. Pearse in behalf of all defendants.

[fol. 279] (Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Jackson: In addition to renewing the motion which I made at the end of the Government's case for dismissal, I also would like to bring to your at-tion the peculiar circumstances with respect to Jacob Mayer in this, that he made an application back in 1936, and that the testimony is uncontradicted that when he made that application he was distinctly told that this application would be sent to Germany.

(Further argument.)

The Court: So far as the question of membership is concerned, I am ruling that is a question of fact for the jury to determine, because they do not have to believe everything that this man said.

(Further argument by Mr. Jackson.)

The Court: I shall rule that there is sufficient evidence here to go to the jury in the case of your client. You may have an exception to my ruling on that in addition to the general exception which I have given to Mr. Pearse.

Mr. Jackson: I would also like to be entitled to the benefit of the argument on behalf of Nauert in so far as it can be made applicable to my client.

The Court: Well, in so far as it can be—and I don't see how it can be—but still you will be given the advantage of it.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

[fol. 280] Mr. Azzoli: Will your Honor pardon me a moment? Your Honor asked Mr. Stanziale if there was an overt act within five years as to Ulrich; he said there was. I beg to differ with him and challenge the record. Mr. Ulrich did nothing since 1939 here at all. There is no overt act, he paid no dues, he kept consistently telling the Consular agent——

(Interrupted.)

The Court: That is for the jury to determine.

I think the motions are now disposed of and we will recess for five minutes, or it may be ten minutes, but I will say this. Outside of the one request which was given me, I shall require immediate presentation of all requests to charge.

Mr. Gechtman: I have just one short motion, sir. May I ask your Honor if you will permit the exhibits as they apply to the defendant Burchardt——

The Court: What is your motion?

Mr. Gechtman: My motion is to permit me to submit to the jury all of the exhibits as they concern the defendant Burchardt separately instead of handing to the jury one big mass.

The Court: Well, everybody had the same right and if they were all handed separately, it would simply mean that they would go in in a mass anyhow.

Mr. Gechtman: Of course, they have the same right but whether they exercise that privilege——

The Court: No, I think we will submit the evidence to the jury in the order of its admission here.

Mr. Gechtman: May I have an exception.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

[fol. 281] Mr. Pearse: Judge, in order that there may be no misunderstanding, as I recall it I submitted a set of requests which cover the ground generally.

The Court: The requests which you submitted will be taken as requests for all.

Mr. Pearse: And then there are separate ones as to individual defendants.

The Court: If you desire to have the benefit of those too, you may have it and I shall take the requests jointly as made for all.

Mr. Pearse: Yes, sir.

And may I ask you if you have any idea of using the requests that Mr. Stanziale has asked for, to read them over first, because we never know what he may put in.

The Court: I assure you I will read yours over too.

We shall recess now for ten minutes.

(A ten-minute recess was taken.)

(Proceedings resumed in presence of the jury.)

The Court: Ladies and gentlemen of the jury, the legal motions have been disposed of and in consultation with counsel, the following scheme has been devised. The counsel for defense will be allowed twenty minutes for summation with the exception of Mr. Azzoli, who will receive thirty minutes, because he has two defendants, and Mr. Pearse fifty minutes, because he has three defendants. The United States Attorney, who talks against all of the accused, will receive an hour and a quarter, with the promise that if he can finish up in less than that he will do it.

Now, this respective time that is allotted is not allotted in the order of importance of the evidence but simply as an [fol. 282] arbitrary time set, so that you won't be too exhaus-ed and won't be called upon to bear too great a burden in trying to remember all of the arguments of counsel. It is not stretching the importance of the case by the length of time or minimizing it by the lessening of the time. It is just a practical scheme which we have tried to work out so that the rights of the defendants would be covered, the rights of the Government would be covered, and you would not be overburdened, all in an attempt to bring about a situation of fairness; and the order of speaking will not be in any order of importance, it will be simply arbitrary, as we established at the first day of the trial.

(Mr. Jackson summed up for the defendant Mayer.)

(Mr. Lordi summed up for the defendant Rudolph.)

(Mr. Campbell summed up on behalf of the defendant Nauert.)

The Court: We shall recess now, ladies and gentlemen of the jury, until 2 o'clock.

(Noon Recess.)

[fol. 283] (Afternoon Session)

(Mr. Gechtman summed up on behalf of the defendant Burchardt.)

(Mr. Azzoli summed up on behalf of the defendants Zimmer and Ulrich.)

(Mr. Hayden summed up on behalf of the defendant Langenberg.)

The Court: Mr. Pearse, I think we shall now recess for five minutes.

(A five-minute recess was taken.)

(Mr. Pearse summed up on behalf of the defendants Fiswick, Poehlmann and Hansen.)

(Mr. Stanziale summed up on behalf of the Government.)

Mr. Pearse: If the Court please, I didn't care to interrupt my friend when he was addressing the jury, and while there were a number of things that he said which I thought were objectionable, nevertheless I will only call one to your Honor's attention. He, perhaps unwittingly, attempted to instruct the jury as to the order in which they should attempt to solve the problem in this case, practically telling them to start at the bottom and work backwards by looking at these statements. I am only making the objection for the purpose of calling it to your Honor's attention so that the jury may not be misguided by any such advice.

The Court: I think that the jury will give to your words, and to those of Mr. Stanziale, the weight that the jury deems they merit. In so far as the law is concerned, the jury will [fol. 284] take its law from the Court alone, and, on the question of when they will take that word from the Court, we will now issue a pronouncement. You have been subjected to a long and trying day. I told you I should make the trial of this case as easy upon you as would be consonant with the requirements of justice. And in accord with that, rather than have you hear the charge now and then retire for a later consideration during the night, I shall deliver

the charge tomorrow, and I think that we shall start at 9.30, because I immediately have other work to do and if you will be here shortly before 9.30 we will try to get started promptly.

Mr. Stanziale: Judge Meaney, Mr. Foreman tells me I spoke 55 minutes.

The Court: I was just going to come to that. I was going to say that after the acrimonious moments that have been spent, everything seemed to wind up beautifully. Mr. Pearse presented the jury with fifteen minutes and Mr. Stanziale with twenty, all of which is to the good, and I will make no promises about myself, it will be as brief as is consistent with the seriousness of the work that I must do.

You will now be excused until 9.30 tomorrow morning.

(Adjourned to Thursday, December 7, 1944, at 9:30 A. M.)

[fol. 285] Newark, N. J.,
Thursday, December 7, 1944, 9.30 A. M.

The Court: Gentlemen, before the Court starts its charge, is there anything you desire to bring to my attention?

Mr. Azzoli: I just wanted to say one word, your Honor.

(Side bar discussion:)

Charge of the Court

The Court: Ladies and gentlemen of the jury: The Grand Jury of the United States, in and for the District of New Jersey, returned an indictment against a group of individuals charging them with conspiracy to violate the Alien Registration Act of 1940. Quite a number of defendants were included in the original indictment, but that number has been reduced by severance, because of the motion of the attorney for the Government, and by the fact that the Court, on motion of counsel for one of the defendants, directed dismissal of the indictment; so that there remain involved now in this indictment Jacob Friedrich Mayer, Fritz Gustav Rudolph, Ernst Henry Nauert, Walter Fritz Wilhelm Burchardt, Edgar Ulrich, Willy Max Zimmer, Arthur Curtis Langenberg, Ferdinand Fiswick, Walter Asmus Hansen and Wilhelm Christian Poehlmann.

The indictment charges that these men, in concert with others, feloniously and unlawfully, knowingly and wilfully combined, confederated and agreed to defraud the United

States of America of its governmental function in securing the full and complete listing and fingerprinting of all aliens [fol. 286] residing and being in the United States, their true names, places of residence, nationality, the date of entry into the United States, activities therein, criminal records and membership in an affiliation with any clubs, societies and organizations devoted to furthering the political activities, public relations, and public policy of a foreign government, and their participation in the meetings and activities of such clubs, associations and organizations. That, generally, is the content of the indictment, which goes on further to set forth various parts and parcels of the conspiracy and certain overt acts.

The mere fact that an indictment has been returned against any individual or group of individuals is not in any way to be considered by you as evidence of their guilt of the charge contained in the indictment. The indictment is simply the recital of an accusation which is made against them and has no probative value whatever. Sometimes people may think that where there is smoke there is fire, if I may be permitted to use a well-known saying. The indictment is not even smoke, and you must not give it any weight whatsoever as indicative of the guilt of the accused. It is simply, as I have told you, a formal recital of a charge made against them.

There are certain considerations which I must bring to your attention which are true in this case and in every criminal case which is submitted to a court and jury for trial.

These defendants are presumed to be innocent until proven guilty beyond a reasonable doubt. They do not have to prove their innocence affirmatively, and that that is a wise and sage provision of our fundamental law and proper concept of the conduct of human relations such as are involved in criminal trials, will be apparent from the slightest consideration, because it is marvelously easy to make a criminal charge and in some instances it would be absolutely [fol. 287] impossible affirmatively to prove innocence. Anyone may hurl a charge at another, and if that accused were required to adduce proof, conclusive proof of innocence of that charge, it would be an intolerable and unfair burden to place upon that individual. And therefore, with due and proper regard for the human rights of all people within our jurisdiction, our founding fathers established as a prerequisite to the consideration of any evidence which may

be brought forth at a trial, the idea that the defendant charged with crime is presumed to be innocent and that that presumption remains with the defendant, or defendants, in this case, throughout the trial, and is a mantle of security surrounding them which may be removed from them only by your verdict of guilty, should you be convinced beyond a reasonable doubt by the evidence brought out at this trial of their guilt.

The burden is upon the Government to prove their guilt, beyond a reasonable doubt. And that burden never shifts. It remains with the Government throughout the trial.

I have used the term "reasonable." That is not any very mystic thing; it is a perfectly ordinary phrase capable of appreciation by ordinary human beings. Reasonable doubt is such doubt as would be engendered in the human mind as it functions normally, as it functions in the conduct of the daily business of its possessor. It has been defined to be that state of the case which is arrived at when the jurors cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge and the guilt of the accused. A defendant is entitled to the benefit of every reasonable doubt begotten by the evidence; but he is entitled to the benefit only of a reasonable doubt. He is not entitled to the benefit of a doubt which might be begotten of unwillingness on the part of jurors to convict any fellow-man; he is not entitled to the benefit of a [fol. 288] doubt which might be begotten of fear on your part that you might conceivably make a mistake; he is not entitled to the benefit of any remote or fantastic or merely possible doubt; but he is entitled to every reasonable doubt which may be begotten in your minds from a consideration of the evidence.

The defendants are charged with the crime of conspiring as outlined in the indictment. A conspiracy is a combination of two or more persons to effect an illegal object or to bring about a legal result by illegal means. It consists essentially of the agreement between two or more individuals, and there must be a meeting of the minds about the object of the alleged agreement. It is not essential that this agreement shall be a formal agreement or an agreement reduced to writing, or an agreement specifically entered into in so many words, so long as there is an intelli-

gent understanding on the part of the partners to the agreement of the common purpose of the combine.

Now, this understanding may be tacit, because normally it is very rare that parties to a conspiracy sit down and formulate a design which they have conceived and sign their names to it, or that they gather together and agree, in other words, to the precise nature of what they are planning. It has been known to happen, but even when it does happen, the proof of such formal agreement is impossible to adduce in many instances; and therefore you have the right to consider circumstances, facts, evidence, and infer from those circumstances and that evidence such conclusions as reasonably might be drawn from those facts and circumstances which may be produced before you.

It is not necessary that all of the co-conspirators know all of the other alleged co-conspirators, nor is it necessary that they have full knowledge of the details of the conspiracy, of all of the means to be used in the accomplishment of the design or end or purpose of the conspiracy. [fol. 289] The community of purpose may exist and extend to all of the conspirators, although they may not have personal acquaintance of all of the other members of that conspiracy. Just as, for instance, a chain might be complete and effective and yet the individual links thereof do not touch or impinge upon every other individual link; but there is a common bond running throughout the links of the chain. So in a conspiracy, if there be this common understanding present in the minds of all the members of the conspiracy, it is not necessary that each conspirator know all of the other conspirators, but it does require at least two people to make a conspiracy. The agreement, the meeting of the minds, the common purpose is the necessary basis of the conspiracy, and the conspiracy may exist when there is this common purpose; but it is not subject to the operation of the law unless there be an overt act committed in the effectuation of the purpose of the conspiracy; so that mere conspiring together or agreeing together is not enough to bring it within the effect of the law. There must, in addition to the agreement, the meeting of the minds, be an overt act which is done by way of accomplishing the object of the conspiracy.

It is necessary, of course, that the accused must know the purpose of the conspiracy; but mere knowledge of the

conspiracy or even approval of the conspiracy is not enough to constitute membership or partnership or participation in the conspiracy. There must be joining in the common design and a meeting of the minds of all of the alleged members of the conspiracy for the purpose of accomplishing the object of the conspiracy.

Now, I think that I should tell you that mere obedience to a direction given by one in authority or allegedly in authority and carried out by a subordinate is not enough to establish participation in a conspiracy. There was some reference during the course of the trial to the fact that Vogel, for instance, was a secretary to the German Consul [fol. 290] who was the head of the Nazi activities in this country, and the thought was suggested that since he was a servant of the Consul he was not therefore a conspirator, but simply carrying out directions. A servant may very well be a member of a conspiracy with his employer, provided there is that common purpose in the mind of each—the joining of the common agreement to bring about the result for which the conspiracy is intended.

This trial has been so long and so many various elements have entered into it, that many thoughts occur to me which I shall touch upon as they do occur, and I trust that the sequence of my words to you may not seem to you too inconsequent or illogical. I shall touch only upon those things which I deem to be important, but the order in which I refer to them will have no marking or significance in so far as the relative importance of the things which I discuss with you is concerned.

There have been admitted into evidence certain statements, written statements and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy; and these admissions and statements are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it. I have ruled that this is a continuing conspiracy, and with the exception of one defendant, to whom I shall advert later, I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of proving the conspiracy itself, but simply to prove acts and course of conduct on the part of the individual making the state-

ment which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the conspiracy.

[fol. 291] It is essential in this particular case that the Government prove, on the part of all these defendants, an intent to defraud the Government of the United States, because intent is an essential part of the conspiracy and without intent a conviction would be completely unjustified.

There were included in the naming part of the indictment certain individuals who were not also included as defendants in this trial; Draeger, Vogel, Zeglin, as I recall it, the German Ambassador and other agents of his, and they are included as members of the conspiracy; and although they are not on trial here now, it is alleged in the indictment that they were members of the conspiracy and as such, their acts, operations and their activities done in furtherance of the common purpose would be chargeable to all of the co-conspirators, if done during the course and continuance of the conspiracy and done in furtherance thereof. Activities of theirs were testified to, and you will recall just what the nature of those activities was and whether or not you believe their activities were the activities of agents of the National Socialist Democratic Workers Party, commonly and shortly known as the Nazi Party, the fact that some of the defendants acted or may have acted illegally or maliciously with the same end in view does not of itself establish the existence of a conspiracy unless it appears that such acts were done pursuant to a common agreement.

I have told you that the intent to defraud must be shown and that it is essential that such intent to defraud be proven by the Government beyond a reasonable doubt, on the part of all of these defendants, before any particular defendant could be found guilty by you. That fraud does not necessarily mean deprivation of any property, tangible property or money from the United States by these defendants. It may mean interference with or obstruction of one of the Government's functions by deceit or dishonest means; so [fol. 292] that the mere fact that no money or tangible thing of value has been taken from the Government is not the controlling factor, because there could be a fraud, as I have said, by the obstruction or interference with a proper governmental operation, if that is done by chicanery or any dishonest method.

You may, of course, consider as a circumstance the unanimity of action on the part of the alleged members of the conspiracy and the similarity of the activities engaged in by them in the filing of their registration certificates; but I must again tell you that such unanimity and similarity would not be evidential of a conspiracy unless the evidence indicated to you that they resulted from the carrying out of a common purpose or a mutual understanding to accomplish some end, or an agreement which was present in the minds of all of them.

There was evidence on the part of the defendants of a difference in so-called membership, which you have the right to consider in weighing the intent of these individuals —the reasons animating them which might modify their intent. There was, for instance, the alleged application for membership, as distinguished from the membership. Whether or not that was simply a front or whether it was an actuality is for you to determine, and to your finding you will give such weight as you think it merits.

Counsel have requested me to charge you along certain lines for certain individuals. I find that I can in most instances meet their request by a general charge, rather than by pointing to the particular individual, because I can see no particular purpose in attempting to weigh the effect of the testimony. I shall not to any great extent comment on the testimony, because that is your function—I mean the determination of what the facts are is your function and I shall trespass upon that as little as I can.

[fol. 293] You may consider the reasons alleged for making representations which were made by any of these defendants, in determining whether they were part of the conspiracy or whether they were acting from motives other than those which would indicate participation in the agreement to effectuate the object of the alleged conspiracy. You may ask yourselves whether or not any individual defendant acted in complete good faith and innocence of sharing in the charge of conspiracy.

One of the defendants has asked me to charge that membership in the Nazi Party was not a crime under our law at the time when it is alleged most of these men joined the Nazi Party. They are not being tried for membership in the Nazi Party as such, as a violation of the law, because membership in the Nazi Party was not a violation of the law.

The effective angle with reference to that here is the concealment of such membership if it existed; and concealment, as a result of a conspiracy to defraud the Government of one of its governmental functions.

You are to consider all of the registrations which have been introduced in evidence here filed by any of the defendants, in weighing the question of whether actually they misrepresented the facts of their status and whether it was the intent of the person making any such registration to correct any misrepresentation he may previously have made. This, of course, would go to the question of intent to defraud the Government.

In so far as the defendant Nauert is concerned, in an excess of caution, in an excess of regard for his rights, the Court has ruled that the only statement in evidence which may be used against him is his own, and that so far as that single defendant is concerned, the statements of his alleged co-conspirators would be invalid. Although no demand was made prior to the trial upon the United States Government to produce an alleged supplemental statement which it now [fol. 294] is testified that he had made, the Government tried to produce it and could not find it in its records. It had what is alleged to be a complete record of such registration, but the fact that that was not found does not conclusively determine that such information was not given and that such supplemental report was not filed; but the fact remains that it was not in the Government's file.

In the course of the trial so-called character witnesses have been produced and they testified to the good reputation of the various defendants for whom they appeared as witnesses. Evidence of good reputation is competent evidence and may be the foundation for the begetting of a reasonable doubt, and if you should have a reasonable doubt about the guilt of these defendants, and that reasonable doubt be engendered or based upon the evidence of good reputation on the part of these defendants, that is a proper basis for such doubt; but I must urge you to remember that reputation evidence alone should not cause you to disregard other and convincing evidence which may have been adduced, if it was so adduced, of the guilt of the accused. In other words, you should not take reputation evidence alone and disregard all of the other evidence, and if there be completely convincing evidence of the guilt of the accused—I am not saying there is at all—if you should

be convinced that there is, that should not so overbalance —I mean the reputation evidence should not so overbalance such convincing evidence as to cause you to disregard it. It is simply one element in the testimony which you are bound to consider.

I have told you that the evidence in this case, because of the nature of the case, is circumstantial. The Government has not proven any written agreement or any formal agreement, but it has brought forth circumstances from which you are to draw logical inferences. Many people erroneously think that circumstantial evidence is not valid evidence and are hesitant, extremely hesitant and unwill- [fol. 295] ing to convict upon circumstantial evidence. But I charge you that circumstantial evidence is valid evidence and must be considered by you in arriving at your determination. But those circumstances must constitute such a continuous and unbroken chain of evidence as to lead you compulsory to the conclusion that the Government has proven the guilt of the accused beyond a reasonable doubt, before you will be justified in convicting him upon it. And if an hypothesis consistent with innocence can reasonably be drawn from the evidence adduced at the trial, as well as an hypothesis consistent with guilt, the hypothesis consistent with innocence must be accepted and the defendant acquitted. In other words, before you would be justified in convicting the defendant, the only hypothesis logically inferable from the evidence must be one consistent with guilt and utterly inconsistent with innocence. That is another protection which our law gives to every defendant. But mind you, the law does not, as has been said by one of our Supreme Court justices, in too great a solicitude for an accused, give him a kind of immunity from punishment because of the difficulty in convicting him, indeed, or even detecting him.

You are the sole judges of the facts. You are to determine what credence you will give to any testimony brought out at this trial, and you are to determine what weight you will give to the evidence adduced here. The problem of determining the truth, in the conflict of evidence, is solely and exclusively and peculiarly yours. I have refrained from commenting on the evidence because I have a belief that the collective minds of the jurors will seek out and discover the truth much better than the mind of any judge, however vivid his desire to determine it.

You have the right to ask yourselves what interest any particular witness had in the outcome of the trial and determine whether or not that interest which he had would [fol. 296] lead the witness to color or distort his or her testimony or distort the truth, or lie about the facts about which they were testifying. All of these defendants have a deep interest in the outcome of this trial and you may very properly ask yourselves whether that interest led them to color their testimony in their own favor. You may ask yourselves the same question about every witness who took the stand. You may determine whether or not the story told by any witness is consistent; you may bear in mind the attitude assumed by any particular witness while testifying and ask yourselves whether they spoke as truthful-speaking persons ordinarily speak; and of course, you must determine this case on the evidence adduced at this trial alone; you may not indulge in surmise or guesswork; you must not indulge in speculation about possibilities or probabilities; you must weigh the evidence and arrive at your determination from the evidence at the trial. Nothing that you know or suspect from outside must affect you; you must consider only what the Government and the defense have produced here at this trial, in weighing what you shall believe about the guilt or innocence of these defendants.

Of course, any matter which was stricken from the record by the Court must not be considered by you, because it is as if it never were or should be that way. During the course of the trial the Court has made certain rulings on motions and questions of law which were raised by various counsel, and those rulings must not affect you in any way. They were not meant to give any indication of how the Court felt about this case. They were rulings which the Court conceived to be compelled by its concepts of the governing rule of law, and you must always remember that counsel are under the obligation to urge everything which they believe, in law and in fairness, is for the benefit of their clients, and that is a duty. Therefore, if counsel have pressed these objections with vigor they have done so only in the performance of their duty.

[fol. 297] We are living in very difficult times and times when our emotions are pretty well stirred and our ears are filled with strident cries of people who are affected by

the hardships of the war, and we ourselves cannot help being emotionally upset. In response to questions of counsel examining the jury before they were sworn, it developed that some of the jury have relatives in the war. It is terribly hard to prescind from such considerations, but it is your absolute duty, your obligation as American citizens so to do. You must not in the slightest be affected by bias or sympathy or prejudice. True, all of these defendants are of German ancestry, and I think all of them of German birth, some of them still German nationals. They are not being tried for that; we are not fighting them now as enemies; we are setting forth the principles and practices of American law and American standards of justice, and because they are before the bar of justice, they are entitled to every protection which our system of law affords a defendant. They are not being tried as Germans who are enemies of the United States, they are being tried as defendants who are before the bar of American justice, and their trial must be conducted in complete accordance with all that we hold true and worthwhile, in accordance with those principles for which those relatives of yours of whom you spoke when you answered questions are fighting.

We must not be swayed by sympathy for people in what to them is an alien land, to the extent that that sympathy will cloud our vision; we must deal out evenhanded justice, not affected by our personal likes or dislikes, by our sympathies, by the woes that have been brought home to us by Germans who were their fellows. That we must completely wash from our minds. And that, I insist, is a sacred obligation.

[fol. 298] We have a symphony of American life and there must be no plangent dissonances in that great symphony. We are proud of all that we stand for and we must stand for that of which we are proud.

In considering this case when you get to the jury room you must confer with your fellow-jurors and discuss with them the evidence adduced at the trial, and your findings must be the honest and fair result of the exercise of your best judgment. Do not arrive at any compromise verdict. Do not yield the profound convictions of your soul in order to arrive at an agreement among the jurors. You may disagree if that is the course which conscience directs you to produce. You must not let the fact that this is a long trial

cause you to sway in any regard from what you believe to be the truth.

One defendant did not take the stand. You are not to draw any conclusion adverse to that defendant because of that fact. He has the right given him by our law not to take the stand, and his plea of not guilty stands as a denial of the charge; so that no inference of his guilt may properly be drawn from that incident.

These defendants must be considered individually with reference to their guilt or innocence, and you must not take them en masse and tar each with the pitch that you may believe any other one is marked with. They are entitled to your individual consideration, and you must weigh the guilt or innocence of each of them individually.

In your verdict you may find one, any, or all guilty or not guilty, as you determine from consideration of the evidence, and if you can arrive at a verdict about some and not about others you will so report. And I say you may find one, any, or all guilty, despite the fact that I have told you beforehand that conspiracy must be entered into by two people or there may exist no conspiracy; because you will remember that Draeger, Vogel and Zeglin and the [fol. 299] other named alleged participants could still have entered into a conspiracy with any one of these people. So that you will weigh the case of each and arrive at your individual verdicts, and return your verdicts that way; and I feel, because of something that happened recently, that I should call to your attention the fact that a recommendation for mercy does not mean anything. Of course, any court to whom such a verdict was returned would take that into consideration, if the verdict should be guilty with a recommendation for mercy, in the matter of sentence; but it is not binding on the Court. I want you to know that.

Counsel in this case have had a difficult task. They are in it mainly because of assignment by the Court, or by a personal interest in employees of theirs; but however they are in it, is was an unpopular task which they had to perform, and that made it the more incumbent upon them to carry out that task completely and well; and I think counsel are entitled to the thanks of the Court, such of them as have given their time because of assignment, and all counsel are entitled to recognition of the fact that they have done a valiant deed, a courageous deed, in fulfilling the oath which they took when they assumed the functions

of advocates. It was not a light burden and they bore it well.

Counsel for the Government, with his usual fairness, has tried to present the Government's case, irascibly sometimes, but that is human, but with a sense of duty and with a recognition of the obligation that was on him to care for the interests of the Government of the United States; because this trial is the case of the United States of America against certain individuals, and the parties to that dispute each have their respective rights. These defendants have their rights which I have outlined to you, and they are rights of which the very government which is prosecuting them is jealous, rights of which the Court is jealous, and [fol. 300] rights of which you, as members of the jury engaged in their trial, must be jealous.

The Government of the United States does not in time of war or time of peace demand any sacrifices to its greatness, because unwarranted convictions based upon prejudice, based upon disregard of evidence, are assaults upon the integrity of the United States and a threat to its continuance as a free nation. Therefore, it demands, this government of ours, that you have due and full consideration of every right which these aliens who are in our midst have, because they stand here in a court of law. But the Government of the United States always has the right to exact from you full and complete regard for it. The Government of the United States is simply you and I and 132,000,000 other people joined together in a common desire, possessed by a dream of the magnificance of the human destiny, determined that under God, human dignity and human rights will receive recognition. And therefore in clarion tones it demands that you protect its rights too; that you permit no assault upon its majesty and dignity by way of undiscovered or unpunished crime. It asks you to maintain an even balance between its rights and the rights of the defendants, favoring neither party to the controversy.

Justice is sometimes portrayed as blind, holding the balance and holding the sword. It is blind only to the gestures of those who would mislead it, but it is keen-sighted and alert to seek out and discover truth. It is keen-sighted to observe the rights of all men and all people and responsive to the claims and appeals of those who ask

that the balance between the respective rights of men and their fellows be maintained.

Your function is a highly important one for these defendants. Now you are every activity of government; finally and conclusively justice will operate through you. [fol. 301] I speak of this, not because I think you do not recognize how solemn is your duty, but because it never can do harm to stress it. I know that because of the very nature of the case you will give it extra consideration, that you will be meticulous in recognizing every protection that the law gives these defendants, and that you will be scrupulously careful to protect the rights of the Government of the United States and the people of the United States.

I feel no further words of mine could add to the weight of the considerations which must affect you and I feel that I can indicate to you your task in no better way than by calling to your minds the oath which you took, a true verdict to render according to the evidence, so help you God.

Have counsel anything further to ask? If so, come up here please. There may be something that I unwittingly have omitted.

(Side bar discussion.)

The Court: Counsel have called my attention to something which you might not have realized. Of course, you know that before you can return a verdict of guilty there must be unanimous agreement. Any definite verdict must be arrived at by you unanimously. It is not a question of majority or 11 out of 12, or anything else; it is a unanimous verdict which must be found before you would be justified in determining it.

I have told you if you cannot arrive at a unanimous verdict you may announce to the Court that you have disagreed. I think, ladies and gentlemen of the jury, that I have covered the law as applied to the case, and that law you will take and apply to the facts as you determine them.

Counsel have asked me to make other charges, but I have refused to charge otherwise than as I have, feeling that I have covered all of their requests though not in the [fol. 302] specific language requested. It must not affect your course in any way because I may make a ruling on the law.

The Foreman: Your Honor, will the two alternates sit in with jury?

The Court: No, they will be excused.

The Foreman: All of the exhibits will be available?

The Court: They will all be available.

The Foreman: Will a complete record of the testimony be available or shall we send for what we want?

The Court: No, it will not be available because it is impossible to type it. You must rely upon your recollection. You may swear the bailiffs.

The Court: The alternates have been excused with the thanks of the Court.

(The jury retired.)

EXCEPTIONS TO CHARGE

Mr. Pearse: I take exception on behalf of all defendants to that portion of your Honor's charge with respect to the admission in evidence of the statements of the defendants and their binding effect upon the other defendants.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Pearse: I take exception to your Honor's refusal to charge request number 11 in the requests which I made, that is with respect to Fiswick.

The Court: I refuse to charge that in the language requested.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

[fol. 303] Mr. Pearse: I take an exception to your Honor's refusal to charge request number 12 with respect to Hansen.

The Court: I refuse to charge in the language requested.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Pearse: I take an exception to your Honor's refusal to charge request number 13 with respect to Hansen.

The Court: I refuse to charge in the language requested.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Pearse: I take an exception to your Honor's refusal to charge request number 14.

The Court: I refuse to charge in the language requested.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Pearse: I take an exception to your Honor's refusal to charge request number 15.

The Court: I refuse to charge in the language requested.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

[fol. 304] Mr. Pearse: I take an exception to your Honor's refusal to charge request number 17.

The Court: I feel that I have covered that sufficiently.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Pearse: I take an exception to your Honor's refusal to charge request number 18.

The Court: I refuse to charge in the language requested.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Pearse: I take an exception to your Honor's refusal to charge request number 19. Thank you very much.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Gechtman: I ask for an exception to your Honor's refusal to charge requests 1 and 3.

The Court: I feel that I have covered 1 sufficiently and 3 I feel I have covered sufficiently.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Gechtman: And 5 and 6, sir.

The Court: I refuse to charge as requested feeling that I have covered the matter involved there sufficiently.

[fol. 305] (Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Gechtman: And 8, 9 and 10, sir.

The Court: I refuse to charge them as requested feeling that I have covered in my general charge the contents of the requests.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Jackson: I think your Honor may have practically charged my first request, although I don't know for sure.

The Court: I refused to charge it in the language requested and feel that I have covered it sufficiently.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

Mr. Jackson: I withdraw the second one.

The Court: Will you cross it out?

Mr. Jackson: I will cross it out and I ask your Honor to charge my third request.

The Court: You take exception to my refusal?

Mr. Jackson: Yes.

The Court: I feel I have sufficiently covered the basic principle involved and refuse to charge it as apposite to this matter.

(Which exception is hereby allowed and sealed accordingly.)

Thomas F. Meaney. (Sealed.)

(At 9:20 P. M. the jury returned to the jury box.)

[fol. 306] FURTHER INSTRUCTIONS TO JURY

The Court: Mr. Foreman, I have received from you a request which I don't quite understand. Will you try and tell me, sir, what it is you want?

The Foreman: It is the recollection of the jury, your Honor, that you made a statement somewhere in the early part of your charge as to joint guilt, or if one was in a conspiracy others might be or could be in it or something to that effect.

The Court: Let me try and clarify it for you.

The Foreman: And then you went on and stated something further in your charge about considering each defendant individually, and you further stated we could bring in a verdict of guilty or not guilty, or that we could not agree, and that you further stated if our recollection is correct, that the defendant Nauert should be considered from the evidence in his statement alone.

The Court: Yes.

The Foreman: And we could not agree as a group as to just what you said.

The Court: Well, so far as the defendant Nauert is concerned, I told you that in excess of care for his rights I had excluded as evidence against him the statements of all of the other alleged co-conspirators. Now, you might attend to the evidence given by Miss Illian and other people who were not charged as co-conspirators and weigh that in its relation to Nauert, but in so far as the admissions of the defendants themselves were concerned, it is only Nauert's own admissions which may be used against him, and that admission, of course, of his may be used against all the other defendants; but theirs, in turn, may not be used against him, although they might be used against all of the others. Is that clear?

The Foreman: Quite clear.

The Court: Now, in so far as the nature of your verdict is concerned, you are to weigh the guilt or innocence of each [fol. 307] of these people individually; some of them you may find, if you so find and determine, were involved in the conspiracy and were guilty; that others were not, and that maybe one, or any number of them, or none. Because, while it takes two people at least to form a conspiracy you must always remember that mentioned as co-conspirators, even though they were not indicted and tried, were Vogel and

Draeger and Zeglin. So that for instance, if you find one person had conspired with Vogel, Draeger and Zeglin, although they did not conspire with any of the others of these defendants, that one person would be guilty; or if you find that more than one, up to and including all of the defendants, had conspired with Draeger, Vogel and Zeglin in this common agreement, which you must find existed before you could find them guilty, you may so find. Now, is there anything further?

The Foreman: The other question was the part of your charge, your Honor, where you said something about all of the defendants were bound by the act of one or something, something as a group, and the other said the individuals.

The Court: Here is what I said, that the acts or admissions of each of the co-conspirators are admissible as evidence against all of the other co-conspirators provided you find that there was a conspiracy and that they were all in it. Of course, if you find that any particular individual defendant was not in this common agreement that the indictment alleges existed, then he would be immediately out of the situation. Does that clarify it?

The Foreman: Quite clear. There is another juror——

The Court: Let him speak for himself.

A Juror: We were just wondering about the indictment, the rest of the co-conspirators, the staff I think it is.

The Court: You are not concerned with them, because, while they are mentioned in the conspiracy, they are not indicted as defendants. For instance, some of them had diplo-[fol. 308] matic immunity and could not be indicted, but they could be mentioned as co-conspirators although they are not being tried and are not defending.

The Foreman: A question came up, your Honor on that. We are all well aware that Dr. Draeger and Hans Vogel and Zeglin are mentioned in the indictment as conspirators, and if we find a conspiracy existed we would then conclude that at least those three were in it in the beginning.

The Court: Yes, but, you see, you are not passing on the question of their guilt or innocence.

The Foreman: No, but there is also mentioned in the indictment besides those three individuals, the German Ambassador and members of the staff and others unknown to the Grand Jury.

The Court: Yes, but you must remember that the only thing that you can concern yourself with is not what you sus-

pect or what you may have heard outside, but what was brought out here at this trial. Now, there was no testimony against the German Ambassador as such. All right, you don't consider that; you consider only the evidence brought out at this trial. Now, is that clear, ladies and gentlemen of the jury?

The Foreman: I think you have clarified it very well, sir, and we have made considerable progress.

The Court: Then you will return to further consideration.

Mr. George Pearse: May I ask your Honor at this time to instruct the jury as to the purpose and the import of the indictment?

The Court: That has all been explained and they evidently understand it.

Mr. Pearse: Well, I have been listening to it——

The Court: Did you hear my charge?

Mr. Pearse: No, sir, I did not.

The Court: I explained it in my charge.

[fol. 309] Mr. Stanziale: Judge Meaney, before the jury goes out may I ask you at side bar one question?

(Side bar colloquy.)

The Court: Anything further, ladies and gentlemen?

The Foreman: Not with your Honor, unless some of the individual jurors have a question.

The Court: Evidently not. You seem to have spoken well for them.

(The jury retired.)

(At 10.45 P. M. the jury resumed their seats in the jury box.)

(All defendants present.)

The Court: Ladies and gentlemen of the jury: I have sent for you, not with any intention of affecting your deliberations in any way, but to inquire of you whether or not you think you are near arriving at a determination or whether you feel that further consideration will be futile.

The Foreman: Your Honor——

The Court: Without telling me what you have done, just——

The Foreman: We have made a great deal of progress.

The Court: You think you could make further progress with further consideration, do you?

The Foreman: I would not wish to hazard a guess of how long.

The Court: No, but you——

The Foreman: We have reached very definite conclusions.

The Court: But you feel that you could with further consideration——

The Foreman: Oh, yes.

The Court: —accomplish something?

[fol. 310] The Foreman: Yes, sir, a large amount of progress.

The Court: Very well; then you may go back for further consideration.

(The jury retired.)

REQUESTS TO CHARGE, SUBMITTED ON BEHALF OF THE DEFENDANTS, FERDINAND FISWICK, WILHELM CHRISTIAN POEHLMAN AND WALTER ASMUS HANSEN

1. The jury is instructed, as a matter of law, that the indictment in this case is no evidence, in the slightest degree, but is a mere formal charge, requiring proof on the part of the prosecution, of all the material allegations contained therein, by the testimony of witnesses, or by facts and circumstances.

2. The jury is instructed that in criminal cases guilt must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the Government. The law does not require of the defendants that they prove themselves innocent, but the law requires the Government to prove the defendants guilty in the manner and form as charged in the indictment, beyond reasonable doubt. Unless the Government has done so, the jury must acquit. Before a verdict of guilty can be rendered, every member of the jury must be able to say, in answer to his individual conscience, that he has in his mind arrived at a fixed opinion based upon the law and the evidence of the case, and nothing else, that the defendants are guilty.

3. The Court instructs the jury that it is your sworn duty to commence the investigation of this case with the presumption that the defendants are innocent of the crime with [fol. 311] which they are charged; and it is equally your duty to enter upon the consideration of each fact and cir-

cumstance in evidence having in your minds at all times the presumption that the defendants are innocent, applying to every such fact and circumstance the presumption of innocence; this presumption is not an idle form, but is a fundamental and important part of the law of the land, and you should act upon this presumption throughout your consideration of the evidence, unless it shall have been overcome by proof of guilt so strong, credible and conclusive as to convince your minds to a moral certainty and beyond every reasonable doubt that the defendants are guilty.

This presumption of innocence attends the defendants throughout the trial. The burden of overcoming this presumption rests upon the government and never shifts to the defendants, and, unless the Government has satisfied this requirement as to each defendant, the jury will acquit such defendant.

4. The Court further charges that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the circumstances and if, after an impartial comparison and consideration of all of the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, your minds are left in such a condition you can candidly say that you have not an abiding conviction to a moral certainty of the truth of the charge or charges against the defendants, you have a reasonable doubt and you should find the defendants not guilty.

5. The jury is instructed that it is a rule of law that the burden of proving the defendants guilty beyond a reason-[fol. 312] able doubt is upon the Government, and never shifts to the defendants but remains upon the Government throughout the case to prove each and every material allegation in the indictment, and does not under any circumstances shift to the defendants to prove their innocence.

6. You are instructed that to warrant a conviction in this case the proof must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendants, or, in other words, the facts proved must all be consistent with and point to their guilt only, and inconsistent with their innocence. The hypothesis of guilt must flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled

either with the theory of innocence or with guilt, the law requires that the defendants be given the benefit of the doubt, and that the theory of innocence must be adopted.

7. The jury is instructed that the elements of the crime of conspiracy of the kind charged in the indictment are, first, an object to be accomplished, which must be to defraud the United States of its governmental functions; second, a plan or scheme embodying means to accomplish the object; third, an agreement between two or more persons whereby they became definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme; and fourth the commission of an overt act in pursuance of this agreement by one of the parties thereto.

8. The jury is instructed that mere knowledge of a violation of the laws of the United States or of a defrauding of the United States by some one or more persons and even participation by a defendant in such violation or fraud does not render him guilty of conspiracy unless he intentionally participated and by common design and agreement with [fol. 313] others conspired to violate the law or to defraud the United States.

8 (a). The basis of a conspiracy is the unity of design and purpose; it is what has been agreed to and not what has been done, and so it has been held that several persons may, simultaneously, actually do, without incurring liability to punishment, that which, if it were the object of a preconcerted design, would render the participants liable to indictment for conspiracy; nor will evidence that each of several defendants acted illegally or maliciously with the same end in view support a charge of conspiracy, unless it appears that such acts were done pursuant to a mutual agreement.

12 C. J., Page 543 (Sec. 5) 2. See Also 12 C. J., Pages 614, 615 and 616. (*Asgill* v. *United States*, 60 F. (2d) 780 at 785.

9. The defendants have produced witnesses who have testified as to their good reputation. I charge you that all of the testimony, including that relating to their good reputation for truth and honesty, must be considered by you and if, on such consideration, there exists reasonable doubt of their guilt, even though that doubt be engendered by their

previous good repute they are entitled to a verdict of not guilty.

10. The indictment in this case charges conspiracy to defraud the United States by interfering with its governmental functions requiring true registration statements by the defendants under the alien registration act of 1940. If you find that the proof shows that the defendants only agreed with Draeger or Vogel or both to omit to state membership in the Nazi party then your verdict must be for the [fol. 314] defendants as this would be a conspiracy to commit an offense against the United States and not the conspiracy charged in the indictment.

11. If you find that the defendant Fiswick did not disclose in his registration statement that he was a member of the Nazi party in the United States because he did not believe or understand that he was a member and that he had only applied for membership in the expectation of returning to Germany, even though he continued to pay dues and that he honestly believed that he should say "I have not" in completing No. 15 in his registration statement, then your verdict as to that defendant must be not guilty.

12. There is proof that the defendant Hansen never applied for membership in the Nazi party either here or in Germany and that he paid dues here on the suggestion of Vogel, the secretary of Draeger. There is also proof that he never consulted with or took the advice of anyone but his fiancee when he declared in his registration statement that he was a non-resident member of the Nazi party in Germany (without activities here). Unless you find that there is proof to the contrary then your verdict as to the defendant Hansen must be not guilty.

13. The registration of aliens act was passed June 28, 1940. The indictment charges that the conspiracy began in September, 1939. There is no proof that it started then. Your deliberations as to whether or not the conspiracy as charged in the indictment existed should begin with a consideration of the evidence of what took place in and around July, 1940.

14. There is some proof of the burning of a card index system in the spring or early summer of 1940. This is no proof of the conspiracy as charged. This evidence was ad-

mitted as part of the proof offered to establish G-17 as a list of Nazi party members in the United States.

[fol. 315] 15. Before you can find a defendant guilty as charged in this indictment you must find (1) that he conferred with Draeger or Vogel or with someone in the office of the German Consulate with respect to registration under the act of 1940; (2) that in preparing his statement he intentionally followed the advice or instructions received at the Consulate to make a false statement concerning his membership or non-membership in the Nazi party and did not do so as his own and independent action or from motives of his own not the result of the advice or instructions received.

16. If you find from the evidence that a defendant filed a false registration statement that in itself is not enough. You must also find that it was so filed as the result of an agreement on his part with another or others named in the indictment so to do.

17. If you find that a defendant merely filed a false or inaccurate registration statement without consulting with or taking advice or instructions from named defendants or named co-conspirators such as Draeger or Vogel or other employees in the German Consulate, then your verdict as to that defendant must be not guilty.

18. There is no issue in this case as to whether or not the representatives in the United States of the Nazi party were engaged in activities to promote the interests and ideology of the party in this country. The issue is whether or not the defendants here on trial conspired with other defendants or co-conspirators named in the indictment to file false alien registration statements required by the act of Congress of 1940 with respect to their individual activities, or their affiliation with or activities in (as a member, official of or worker for) the Nazi party either here or [fol. 316] elsewhere. It is important that you keep the issue clear in your minds during your deliberation. For you to find that a particular defendant merely filed a false or misleading registration statement is not sufficient to convict him of the charge. You must find that he not only deliberately filed such false or misleading registration statement with intent to deceive but that he did so as the

result of an agreement entered into by him with one or more of the defendants or co-conspirators named in the indictment so to do.

19. In your consideration of the evidence in this case you must adhere strictly to the following rules, which I charge you as a matter of law:

(a) You are not to be persuaded by the fact that the Government of the United States is a party to this action, for I charge you that the Government is to be considered as any other party and its counsel as any other counsel for any other party.

(b) You must consider only the evidence in this case.

(c) You are to disregard answers of witnesses which the Court has directed to be stricken out at any stage of the trial.

(d) You are not to construe the denial by the Court of any motion made to dismiss this indictment as such a ruling is not to be construed by you as any indication of the guilt or innocence of the defendants.

(e) You must not indulge in speculation or pursue possibilities, probabilities, conjectures or suspicions as you are required to render a decision solely upon the evidence. You must render a verdict representing your real opinion and judgment.

[fol. 317] (f) It is your duty to confer with your fellow jurors and discuss the evidence with them. The verdict which you render must represent the real judgment and honest conclusion of each of you, and no one of you may surrender his earnest belief concerning the guilt or innocence of any of the defendants for the purpose of preventing a disagreement or for the purpose of arriving at a compromise, notwithstanding the duration of this trial.

(g) During the trial from time to time various statements and arguments have been made by counsel both for the Government and for the defense. Such statements and arguments are not evidence and are not to be taken by you as evidence, no matter who made them. You and you alone are the sole judges of the facts in this case and upon you alone rests the responsibility of determining the guilt

or innocence of the defendants here on trial, following my instructions only with respect to the law in the case as I have defined it for you.

(h) You must not permit suspicion to displace proof, and you must not permit passion or prejudice to enter into your consideration of the evidence in this case. And this last admonition is particularly important in times like these when patriotism is at a high pitch and many people have to a certain extent lost their mental poise. You as jurors should be extremely cautious when in a case like this you are required to pass upon the rights of these men on trial charged as they are with an offense affecting the welfare of the Government. (*United States* v. *Hall*, 256 Fed., 748 at 752.)

* * * * * * *

[fol. 318] REQUESTS TO CHARGE, SUBMITTED ON BEHALF OF THE DEFENDANT, FRITZ GUSTAV RUDOLPH

1. A conspiracy at Common Law has generally been defined as a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. 15 C. J. S., Sec. 38, Page 1061.

2. The unlawful combination being the gist of the conspiracy it follows that there must be an agreement of some kind.

U. S.-Lynch vs. *Magnavox Co.*, 94 F. 2883.

There must be unity of design or purpose, a concert of will and endeavor, comprising what has been agreed, not what has been done, although all the parties need not be actuated by the same motive.

U. S.-Lefco vs. *U. S.*, 74 F. 2d 66.
U. S.-Asgil vs. *U. S.*, 60 F. 2d 780.

3. Mere knowledge, acquiescence or approval of the act, without cooperation or agreement to cooperate is, not enough to constitute one a party to a conspiracy.

U. S.-Zito vs. *U. S.*, 64 F. 2, 772.

In order to constitute the offense so far as combination is concerned, there must be a meeting of the minds, all the parties working together with a single design for the accomplishment of the common purpose.

Thomas vs. *U. S.*, 57 F. 2d 1039.
Young vs. *U. S.*, 48 F. 2nd 26.

[fol. 319] But that there must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.

U. S.-Marino vs. *U. S.*, 91 F. 2d 691.
Blunerthal vs. *U. S.*, 88 F. 2d 522.

It has been said that if different groups of persons although having a similar general purpose, cooperate without any privity with each other but towards wholly separate ends, even though similar in character, the combination does constitute a single conspiracy.

U. S. vs. *McConnell* (Pa.), 285.

In order to convict Fritz Gustav Rudolph of the charge mentioned in the conspiracy as set forth in the indictment, it is necessary to show the following:

1. That he committed an unlawful act against the United States Government.

2. A plan or scheme embodying means to accomplish this illegal act.

3. An agreement or understanding between two or more persons whereby they became definitely committed to cooperate for the accomplishment of its object by the means embodied in the scheme or by an effectual means.

4. An overt act by one or more of the conspirators to effect the object of the conspiracy. See 186, Fed. 375.

[fol.320] REQUESTS TO CHARGE, SUBMITTED ON BEHALF OF THE DEFENDANT, JACOB FRIEDRICH MAYER

1. I ask your Honor to charge the Jury that Jacob Mayer had a lawful right to go to the German Consulate in 1936 and while there to make an application to join the Nazi Party.

2. (Crossed out by counsel, and initialled by counsel on the original requests)

I ask your Honor to charge in words or substance that a conspiracy means that there was a common purpose supported by a concerted action to defraud, that each person had the intent to do it, that it was common to each of them, and that each understood the others as having that purpose.

3. I ask your Honor to charge further that before a lawful act becomes unlawful, because of the intent which prompted it, the genesis of the act must be malicious and unmixed with any other purpose and exclusively directed for the injury of another.

DISTRICT OF NEW JERSEY

NOV 28 1944

EXHIBIT No. 94-R
THELMA C. BERGEN, C. S. R.
OFFICIAL REPORTER

10. I am, or have been within the past 5 years, or intend to be engaged in the following activities:
In addition to other information, list memberships or activities in clubs, organizations, or societies.

None

11. My military or naval service has been None
(branch or service) (dates)

From ---------- to ----------

11. a. I None applied for first citizenship papers in the United States. Date of application 0----------
(date, court)

First citizenship papers received ----------
(date) (place) (court) (state)

Filed petition for naturalization ----------
(date) (court) (state)

12. a. I have the following specified relatives living in the United States:

Parent(s) None (name, address, and date of birth) Husband or wife Yes (name and date of birth) Children Yes (names, addresses, and dates of birth)

14. I None (name, address, and date of birth) have been arrested or indicted for, or convicted of any offense (or offenses). These offenses are:

Nature of offense	Date of arrest	Place of arrest	Disposition of case

15. Within the past 5 years I None (name, address, and date of birth) have affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government.

AFFIDAVIT FOR PERSONS 14 YEARS OF AGE AND OLDER

I have read or have had read to me the above statements, and do hereby swear (or affirm) that these statements are true and complete to the best of my knowledge and belief.

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp below.

Faith G. Randolph
(signature of witness)

Harry F. Wyeth
(signature of applicant)

AFFIDAVIT FOR PARENT OR GUARDIAN ONLY

I am the (mother or father or guardian or my husband mentioned) (wife)

the above-named alien, who is (name of alien or wife or son or daughter) and have made the above allegations for him (or her). I have read or have had the same read to me, and do hereby swear (or affirm) that they are true and complete to the best of my knowledge, information, and belief.

(signature of mother or father or guardian or my husband mentioned) (wife)

PRINT NAME, ADDRESS, AND RELATION OF PERSON SIGNING THIS AFFIDAVIT IN 9-10, ABOVE.

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp at the right.

(signature of witness)

U. S. DEPARTMENT OF JUSTICE
DEC 3 19--
NEWARK, N. J.

(signature of applicant)

EXHIBIT G-1-F.

(Opposite ☞.)

Form AR-2
Manuscript Index

4652226

247

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

ALIEN REGISTRATION FORM

1. (a) My name is Ferdinand "one" Plewick
(b) I entered the United States under the name of Ferdinand "Plewick
(c) I have also been known by the following names (Include maiden name if a married woman, professional names, nicknames, and aliases): None
2. (a) I live at 146-48th Street Union City Hudson New Jersey
(b) My post-office address is same
3. (a) I was born on June 7 1895
(b) I was born in (or near) Dinklage Oldenburg Germany
4. I am a citizen or subject of None Last of Germany
5. (a) I am a (check one): Male ☒ Female ☐
(b) My marital status is (check one): Single ☐ Married ☒ Widowed ☐ Divorced ☐
(c) My race is (check one): White ☒ Negro ☐ Japanese ☐ Chinese ☐ Other
6. I am 5 feet, 11 inches in height, weigh 179 pounds, have brown hair and blue eyes.
7. (a) I last arrived in the United States at New York, New York on June 28, 1937
(b) I came to by S. S. Hamburg Hamburg American Line
(c) I came as a (check one): Passenger ☒ Crew member ☐ Stowaway ☐ Other
(d) I entered the United States as a (check one): Permanent resident ☒ Visitor ☐ Student ☐ Treaty merchant ☐ Exempt ☐ Official of a foreign government ☐ Employee of a foreign government official ☐ Other
(e) I first arrived in the United States on January 26 1929
8. (a) I have lived in the United States a total of 11½ years
(b) I expect to reside in the United States Permanently
9. (a) My usual occupation is Storekeeper (b) My present occupation is Storekeeper
(c) My employer (or registering parent or guardian) is myself
whose address is 146-48th Street, Union City, N.J.
and whom I serve as Proprietor of Grocery Store

All figures agree to comparison of reverse of card. For additional number if person has only the above number see reverse.

	220
	57
	06
	35
	05
	10
	10
	0
	2
	1
	192
	37
	Hamburg
	1
	0
	1
	11
	5
	0
	1
	61

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOV 28 1944

Docket No. 91-F
WILLIAM C. BERGEN, C.S.R.
OFFICIAL REPORTER

10. I am, or have been within the past 5 years, or intend to be engaged in the following activities: In addition to other information, list memberships or activities in clubs, organizations. None

11. My military or naval service has been Germany (COUNTRY) Army (BRANCH OF SERVICE) From May 1915 (DATE) to Dec. 1918 (DATE)

12. I have not (HAVE OR HAVE NOT) applied for first citizenship papers in the United States. Date of application (DATE)
First citizenship papers received (DATE)
Filed petition for naturalization (DATE) (COURT) (STATE)

13. I have the following specified relatives living in the United States:
Parent(s) None (GIVE NAME OR NAMES) Husband or wife Yes (YES OR NO) Children None (GIVE NAMES)

14. I have not (HAVE OR HAVE NOT) been arrested or indicted for, or convicted of any offense (or offenses). These offenses are:

Nature of offense	Date of arrest	Place of arrest	Disposition of case

15. Within the past 5 years I have not (HAVE OR HAVE NOT) been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government.

AFFIDAVIT FOR PERSONS 14 YEARS OF AGE AND OLDER

I have read or have had read to me the above statements, and do hereby swear (or affirm) that these statements are true and complete to the best of my knowledge and belief.

Ferdinand Fessock (SIGNATURE OF ALIEN)

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp below.

Robert S. Swensen (SIGNATURE OF OFFICIAL)

AFFIDAVIT FOR PARENT OR GUARDIAN ONLY

I am the (GIVE RELATIONSHIP OR STATE WHETHER GUARDIAN OR NEXT FRIEND) of the above-named alien, who is (GIVE AGE) and have made the above allegations for him (or her). I have read or have had the above read to me, and do hereby swear (or affirm) that they are true and complete to the best of my knowledge, information, and belief.

(SIGNATURE OF PARENT OR GUARDIAN) (TO BE SIGNED ONLY IN PERSON BEFORE THE CLERK)

PRINT NAME, ADDRESS, AND NUMBER OF PERSON SIGNING THIS AFFIDAVIT IN SEC. 4 ABOVE.

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp at the right.

(SIGNATURE OF OFFICIAL)

NEW YORK DEC 4 1940 REGISTER

Form AR-3
OMB No. 4572339

106

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

ALIEN REGISTRATION FORM

1. (a) My name is Joseph Fred Meyer
(b) I entered the United States under the name of Joseph Fred Meyer
(c) I have also been known by the following names (Include maiden name if a married woman, professional names, nicknames, and aliases): None

2. (a) I live at 295 Paterson Avenue East Rutherford Bergen New Jersey
(b) My post-office address is Same

3. (a) I was born on July 21 1901
(b) I was born in (or near) Grumerstadt Bayern Germany

4. I am a citizen or subject of Rome - last a citizen of Germany

5. (a) I am a (check one): Male ☒ Female ☐
(b) My marital status is (check one): Single ☐ Married ☒ Widowed ☐ Divorced ☐

6. (c) My race is (check one): White ☒ Negro ☐ Japanese ☐ Chinese ☐ Other
I am 5 feet 10 inches in height, weigh 146 pounds, have brown hair and grey eyes.

7. (a) I last arrived in the United States at New York, N. Y. on June 7, 1923
(b) I came in by S. S. Thuringia - Hamburg American Line
(c) I came as a (check one): Passenger ☒ Crew member ☐ Stowaway ☐ Other
(d) I entered the United States as a (check one): Permanent resident ☒ Visitor ☐ Student ☐ Treaty merchant ☐ Spouse ☐ Child of a foreign government ☐ Employee of a foreign government official ☐ Other

(e) I first arrived in the United States on June 7 1923

8. (a) I have lived in the United States a total of sixteen and one half years.
(b) I expect to remain in the United States permanently
9. (a) My usual occupation is baker (b) My present occupation is baker
(c) My employer (or registering parent or guardian) is self
whose address is 287 Paterson Avenue East Rutherford N.J.
and whose business is Bakery

All items must be answered by persons 14 years of age or older. For children under 14 years of age, only the items marked with a star (☆) must be answered by the parent or guardian.

PROVINCE OF NEW JERSEY

NOV 28 1944

10. I am, or have been within the past 5 years, or intend to be engaged in the following employment: G & B
In addition to other information, list memberships or activities in clubs, organizations, or societies. OFFICIAL REPORTER

Reichsdeutsche Vereinigung New York, N.Y. — 1393

11. My military or naval service has been None — 1

From ____ to ____

12. ☆I have applied for first citizenship papers in the United States. Date of application May 7, 1937

First citizenship papers received May 13, 1938 County Richmond N.Y. — 2

Filed petition for naturalization ____

13. ☆I have the following specified relatives living in the United States:

Parent(s) None Husband or wife Yes Children Two — 2

14. I have not been accused or indicted for, or convicted of any offense (or offenses). These offenses are:

Nature of offense	Date of arrest	Place of arrest	Disposition of case	
				1

15. Within the past 5 years I have not been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government. — 1

AFFIDAVIT FOR PERSONS 14 YEARS OF AGE AND OLDER /

I have read or have had read to me the above statements, and do hereby swear (or affirm) that these statements are true and complete to the best of my knowledge and belief.

Jacob L. Mayer

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp below.

AFFIDAVIT FOR PARENT OR GUARDIAN ONLY

I am the ____ of the above-named alien, who is ____ and have made the above allegations for him (or her). I have read or have had the same read to me, and do hereby swear (or affirm) that they are true and complete to the best of my knowledge, information, and belief.

PRINT NAME, ADDRESS, AND OCCUPATION OF PERSON SIGNING THIS AFFIDAVIT IN THIS SPACE.

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp at the right.

HACKENSACK, N.J. DEC 23 1940 REGISTERED

Form AR-8
OFFICE USE

5980588

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

ALIEN REGISTRATION FORM

	OFFICE USE
1. ☆(a) My name is Fritz (first name) Overbey (middle name) Rudolph (last name)	341
☆(b) I entered the United States under the name of Fritz Rudolph	
☆(c) I have also been known by the following names (Include maiden name if a married woman, professional names, nicknames, and aliases): None	
2. ☆(a) I live at (321) Harding Avenue (street address or rural route) Teaneck (city) Bergen (county) New Jersey (state)	81 82
☆(b) My post-office address is Same (if same as above, so state) (state)	05
3. ☆(a) I was born on May (month) 27th (day) 1906 (year)	10
☆(b) I was born in (or near) Bayern (state) Silesia (province) Germany (country)	10
4. ☆ I am a citizen or subject of Germany (country)	1
5. ☆(a) I am a (check one): Male ☒ Female ☐ ☆(b) My marital status is (check one): Single ☐ Married ☒ Widowed ☐ Divorced ☐	2 0
☆(c) My race is (check one): White ☒ Negro ☐ Japanese ☐ Chinese ☐ Other	1
6. I am 5 feet, 8 inches in height, weigh 162 pounds, have Brown (color) hair and Brown (color) eyes.	172
7. ☆(a) I last arrived in the United States at New York (port or place of entry) New York (state) on Sept. 10, 1934 (month, day and year)	09/10/34
☆(b) I came to by S.S. Milwaukee (vessel or vehicle, railroad company or other means of transportation)	Milwauk
☆(c) I came as a (check one): Passenger ☒ Crew member ☐ Stowaway ☐ Other	1
☆(d) I entered the United States as a (check one): Permanent resident ☒ Visitor ☐ Student ☐ Treaty merchant ☐ Exempt ☐ Official of a foreign government ☐ Employee of a foreign government official ☐ Other	1 0
☆(e) I first arrived in the United States on July (month) 19th (day) 1890 (year)	
8. ☆(a) I have lived in the United States a total of Ten (10) years.	1 0
☆(b) I expect to remain in the United States Permanently (permanently, for an indefinite period, or state exact time)	3
9. (a) My usual occupation is Painter (b) My present occupation is Painter	
☆(c) My employer (or registering parent or guardian) is John Penn (name)	U9
whose address is 6716 Christie Street Ridgefield Park, New Jersey (number and street or rural route) (city or town) (state)	
and whose business is Painting	

All items must be answered by persons 14 years of age or older. For children under 14 years of age, only the items marked with a star (☆) must be answered by the parent or guardian. All answers must be complete and legible. Do not write in the margins.

[fol. 326] EXHIBIT G-2

(Translation from the German)

NATIONAL SOCIALIST GERMAN WORKERS PARTY

Munich, Brown House

Region: Do Not Write In This Space
Local Unit: No. .....

APPLICATION
for admittance
into the National Socialist German Workers Party

I hereby make application for admittance to the National Socialist German Workers Party. I am of German descent and free of Jewish or colored racial strains, belong to no secret society nor to any other forbidden group or organization and I will not enter such during my membership in the National Socialist German Workers Party. I promise to give the Fuehrer unconditional obedience and as a loyal follower of the Fuehrer to serve the Party with all my strength.

I assume the obligation to pay the fixed initiation fee and the monthly dues, payable in advance, with which I am assessed on the basis of the Dues Decree of the National Socialist German Workers Party. Moreover, I am willing to pay a single voluntary contribution of reichsmarks to further the Party.

Write Legibly *Monthly Membership Dues* *Reichsmarks*
First and last name: .....
Profession or occupation: .....
Date of birth: ..... Place of birth: .....
Single-married-widowed-divorced
Residence: .....
Street No. .....
Date: .....
Initiation Fee: ..... Reichsmarks
Furtherance Contribution: ..... Reichsmarks

..... (Signature)

18—51

[fol. 327] EXHIBIT G-56

Ellis Island, New York
November 23, 1943

I, Jacob Friedrich Mayer, make the following statement to Robert L. Bell and Bruce E. Primm, Special Agents of the F. B. I. with the full knowledge that I need make no statement and that any made be used against me in a court of law. No threats, promises or other forms of inducement have been used to obtain this statement.

I was born in Gruenstadt, Germany July 21, 1901. I entered the United States at the Port of New York June 7, 1923.

In the latter part of 1936 or the early part of 1937 I was asked by Marie Aubrey who had been in my employ if I would like to join the Nationalsozialistische Deutsch Arbeiterpartei—the National Socialist German Labor Party. She went to the German Consulate in New York City with me where I talked to Von Wimmersperg the leader of the above mentioned party in this vicinity. I made application for membership in the said party and a few weeks later received a membership card bearing my name, address date and place of birth and a number which I assume was my party number. I went to the consulate several times—about seven or eight times—to pay dues to the party. The last time I went to the Consulate was in December 1940.

Soon after my first trip to the Consulate at which time I saw Von Wimmersperg, I heard that Dr. Draeger the German Consulate had become the leader of the party in this area. When I paid dues it was always by a personal visit to the German Consulate. I paid the dues to a girl, whose name I do not remember, outside of Draeger's office. Over the period of time that I paid dues there were two different girls in the office who collected the dues. I went to none of the regular party meetings until about Sep-[fol. 328] tember 1939 when Dr. Draeger called me into the Consulate. At this meeting there were twenty or twenty-five other persons present. He asked us which of us wished to return to Germany. Most of the others stated that they wanted to return to Germany. He also told us that we could become a citizen of the United States and remain in the Party. He also said that everyone must

remain faithful to the Fuehrer and the Party—or something to that effect.

In December 1940 I went to the Consulate to pay dues. At this time Vogel took from me my membership card saying that they would keep it from then on. He also wrote out for me the answers I was to put on my 1940 Alien Registration form. The answers he wrote out for me were the answers I was to put to questions number 10 and 15. In answer to question 10 I was told to put down, "Reichsdeutsche Vereinigung, New York, N. Y." In answer to question 15 I was told to insert, "have not." I had never heard of the Reichsdeutsche Vereinigung and was never a member of this organization. He also told me to tell anyone who asked me that this was a welfare organization. I was told to leave out that I was a member of the National Socialist German Workers Party.

As a result of the meeting in September 1939 I decided that I was not so much in favor of the Party. After December 1940 I had nothing further to do with the Party or the Consulate. I do not know why I joined the Party and my wife was against it. In December 1940 I told Vogel that I was not desirous of remaining a member of the Party; it was then that he took from me my membership card.

I have read, and have had read to me the above statement typed by Agent Bell at my direction from information given him by me. I have initialled each page and each [fol. 329] correction. The contents of this statement are true to the best of my knowledge.

Jacob Mayer.

Witness: Bruce E. Primm,
Special Agent, FBI

Witness: Robert L. Bell,
Special Agent, FBI

Exhibit G-65

Union City, N. J.
April 29, 1944

I, Ferdinand Fiswick, wish to make the following statement to George F. Dinneen and Wendell V. Sweet who have identified themselves to me as special agents of the

Federal Bureau of Investigation: No threats or promises or force of any kind was used to obtain this statement. I realize this statement may be used against me in a court of law.

I filled out an application for membership in the National Socialist German Workers Party in July or August of 1939. At the the time, I filled out this application in the presence of Hans Vogel. An acquaintance of mine by the name of Willi Thau had suggested to me that I go to see Hans Vogel at the German Consulate, as Hans Vogel at the German Consulate was in charge of filling out applications for membership in the National Socialist German Workers Party. Willi Thau was my sponsor in the National Socialist German Workers Party and Willi Thau advised me that he would supply another sponsor for my membership in the National Socialist German Workers Party. At the [fol. 330] time I filed my application with Hans Vogel I paid about ten dollars incl initiation fee and then I paid dues of one dollar a month at the office of the German Consulate, 17 Battery Place, New York, N. Y. up until the time the German Consulate closed its office at 17 Battery Place in about June of 1941.

In this application for membership in the National Socialist German Workers Party I stated that I recognized Adolf Hitler as the leader of the German Reich and I agreed to obey the laws of the German Reich.

In 1940 I received a notice from the German Consulate at 17 Battery Place New York N. Y. to the effect that I was requested to appear at the German Consulate office and to ask for Hans Vogel. I went to Hans Vogel's office at the German Consulate and Vogel discussed the Alien Registration of 1940. Vogel told myself and four other applicants that it would not be necessary for us to put down in the Alien Registration form of 1940 that we were members of the National Socialist German Workers Party. Since we had not as yet received our membership books from Germany I did not put down in my alien registration form of 1940 that I was a member of or affiliated in any way with the National Socialist German Workers Party. I followed the instructions of Hans Vogel in filling out this alien registration of 1940. Since filing my application for membership in the National Socialist German Workers Party I received invitations to attend National Socialist

German Workers Party festivals at the New York Turnehalle.

In April or May 1941 I attended a meeting of the National Socialist German Workers Party at the German Consulate 17 Battery Place, New York N. Y. at which time Dr. Draeger advised that the *Consulate* German Consulate was closing and that war was possibly coming, and that all of the members should obey the laws of the United [fol. 331] States and that we should destroy our membership cards.

I destroyed my prospective membership card in the National Socialist German Workers Party at the time I arrived home that night after attending this final meeting of the National Socialist German Workers Party.

I do not have my last German Passport as I burned *it in* it at the same time I destroyed my prospective membership card in the National Socialist German Workers Party. I burned my German passport, at that time, as it showed that I had registered with the German Consulate for military service in 1939.

This statement consisting of four pages is true. I have read each page and initialed each page and each correction on each page F. F.

Ferdinand Fiswick.

Witness George F. Dinneen, Special Agent of the F. B. I.
Wendell V. Sweet, Special Agent F. B. I. Newark.

[fol. 332] Ferdinand Fiswick

Ellis Island, N. Y. Harbor,
Room O. R. R.,
May 26, 1944.

Department of Justice, U. S. Attorn-y, Mr. Thorn Lord,
Trenton, N. J.

Dear Mr. U. S. Attorn-y:

When the F. B. I. men took me to Ellis Island I asked them what was held against me. They told me four things: Perjury, Argument, Noncooperation and not bringing witnesses.

I think it my duty to defend myself against those charges. Please permit me to bring the following defending explanations:

Perjury. In my first statement about my actions within the jurisdiction of the U. S. A. I did not say otherwise, because it could have made me guilty of a crime which I did not commit. I said that I did not belong to the Nazi Party, neither here nor in Germany, which statement was true, because I was and intended to be only a prospective member in case I had to go back to Germany. I did not sign an application for full membership here in America. Because the application was meant to become eventually a member if and when I had to go back to Germany. In my later statement given voluntarily and outside the jurisdiction of the U. S. A. I have told all. What I did was not a crime, but only for the protection of myself and my wife, without having any political or disloyal purposes in mind.

Arguments. Not for the sake of argument I have argued, but only in the belief to gett matters right, and not to be pinned down as a person with a doubtful character or criminal intentions.

[fol. 333] Nonco-operation. My will and acting to tell everything voluntarily showed my co-operation to the fullest extent. Easily I could have stuck to my first statements if I wanted to, but the matter and my name cleared I have told it by and by. Otherwise there would have been more confusion for me in the end.

Witnesses. Two times I have witnesses taken along for a hearing and willing to testify before a hearing board. On both occasions the hearing did not take place. I did not like to impose on the witnesses too often and take them away from essential work. Any time the hearing board wants to hear witnesses in my case I can gives names or bring witnesses, who are gladly willing to testify for me.

Sympathy and Loyalty. My voluntary information shows in itself that I gave up the rest of my dual-loyalty to Germany in favor of the U. S. A. This means that I desire to help the U. S. A. entirely and only in the war effort, if given back to freedom and my wife.

Helping in the war effort. I have worked day by day for 13 to 14 hours to cooperate with the O. P. A. regulations and to distribute to the people rationed and unrationed food products. I have paid taxes to city and federal Governments, Contributed to the Red Cross and other charitable organizations, sent gift packages to our boys in military services, and with my savings I paid off on a

mortgage which is held by the Hoboken Bank of Savings, which institution buys war bonds for the liquid money. If I can do more, I will.

Sickness of wife. Herewith enclosed I am sending a doctors certificate, which shows that my wife is under doctors care and for the sake of her health needs my help in the store busines, because reasonable help is hard to get and my wife cannot do it alone, especially the heavy lifting and correct calculations of O. P. A. ceiling prices, etc.

Activities. Besides work in business I have had very little time to be active otherwise. Only on Sundays my [fol. 334] wife and I had a couple of hours for recreation which we filled out by going to church service, see a movy picture, or to visit friends and relatives then and when.

It is my desire to prove my loyalty and to help in the war effort instead of idling useful time away as a detained friendly alien.

Respectfully, Ferdinand Fiswick.

Enclosed: Doctors Certificate.

(Rubber Stamp:) Detained Alien Enemy Mail Examined by 3-4983 U. S. I. & N. S.

Ferdinand Fiswick
Ellis Island,
Room O. R. R.,
May 19, 1944.

U. S. Attorney, Mr. Thorn Lord, Trenton, N. J.

Dear Mr. U. S. Attorn-y:

With reference to my detention in Ellis Island I should like to ask respectfully for another re-hearing as I like to bring the following reasons for my defense.

Since 1929 I have been in the U. S. A. and have never done anything against law and order. Especially since the war broke out I have been entirely loyal to the cause of the U. S. A. by helping in the war effort to the best of my ability.

[fol. 335] I like to outline three main reasons why I went to the German Consular Office and came on the list of prospective membership in the Nazi Party.

(1) In Summer 1939 when I went to the German Consular Office in New York I did so for the simple reason of

material security for my wife and myself because my wife became sick at that time, and is up to now still under doctors care. That time I did not know how to upkeep the store business without the help and health of my wife. I was put before the decision to either give up the business and go back to Germany where we have close relatives, or to stay here and live eventually from public welfare in case I should not be able to upkeep the store business alone. In 1940 my wife became very sick and she had to be operated on in the North Hudson Hospital by Doctor Stenneck. Fortunately we managed to keep the store intact, so that it was not necessary for us to look for social or material security in Germany.

(2) When it became necessary for me to look for my wifes welfare and security I had the idea in mind to ev-t-ly go back to Germany by exchanging my business with real estate in Germany which belonged to a jewisch refugee family in Union City N. J. I found out from the owner of the real estate in Germany and the German Consular Office that such exchanges would not be grantet easely, but in cases of prospective membership in the Nazi Party, it would be sooner possible to arange the exchange.

(3) In 1938-39 I had correspondence with my brother Sebald Fiswick who wrote to me about his business affairs. Since he never became a member of the Nazi Party, he told me about his hardships in Germany to get orders. He offered me a partnership in name or full in case I had to go back to Germany for health or business reasons, and at the same time advised me to apply for prospective membership in the Nazi Party in Germany, so that it might help him [fol. 336] and me in business matters, because in Germany I would have to wait for years to be able to become a member. This proposition was held out to me for economic reasons only, as both, my brother and I, had the understanding that we were not Nazis, but former members of the Catholic Center Party. I wrote back to him, that I did not indeed intend to come back to Germany, but that in case of need I would accept his offer and in the meantime oblige him to apply for prospective membership, so that he evtll. could gain from it in this manner.

In all my actions I had never in mind to do political work for the Nazi Party, and in fact I have always pulled away from anything that could bring me in difficulties with

politics, especially within the U. S. A., where I was considering myself as a guest and had to behave as such by obeying the laws and keep out of politics. I have been raised as a tolerant catholic with the understanding of human love to God and men. I respect the ideas of the christian religion as necessary to upkeep the christian way of life.

If anybody stands up and tells me that the above statements are not the full truth, I can only say that I have told everything to the best of my knowledge and belief, that I am willing to help the U. S. A. in the war effort as I did before, till a just and lasting peace is here for all people on earth.

To fulfill this my pledge I respectfully plead to release me from detention, so that I can do my part for the U. S. A.

Respectfully, Ferdinand Fiswick.

(Rubber Stamp:) Detained Alien Enemy Mail. Examined by 3-4983, U. S. I. & N. S.

[fol. 337] EXHIBIT G-67

November 17, 1943.

I, FRITZ GUSTAV RUDOLPH, resident of 231 Harding Avenue, Teaneck, N. J., do make the following voluntary statements to GENE H. STUDEBAKER and DONALD A. ROSEN who have identified themselves to me as being Special Agents of the Federal Bureau of Investigation. No promises of immunity or reward have been made to me and no duress has been practiced on me to get me to make these statements.

I was born in Sagan, Silesia, Germany, May 27, 1905, and arrived in the United States on the SS Albert Ballin, July 19, 1930. My wife, HERTA THERESA RUDOLPH, born February 17, 1906, entered the U. S. on the SS Europa, May 16, 1935. I married her in 1934 ~~when I~~ returned to Germany to attend my mother who was then ill.

There are three children issue of my marriage. There names are Magda, age 8; Erich, age 6; and Horst, age 2. They all reside at the above address with me.

~~Sometime around March~~ of 1938, I went to the German ~~Consul's Office in New York City. While there,~~ I made an application for membership in the NATIONAL SOCIALIST GER-

MAN WORKERS PARTY which I knew to be the Official party of the German Government at that time. I received a yellow book as evidence of my having filed this application and as a record of the dues that I paid. At that time, I paid the first dues. I no longer have this book having burned it shortly after receiving news through the Swiss Legation that my mother and brother in Germany had died.

I continued to pay dues up to about a month or so before PEARL HARBOR, December 7, 1941. I believe that I paid about $14.00 in dues during this period of time. During this period of time I recall receiving two letters from the German Consulate advising me that I was behind in my dues payments.

[fol. 338] At the time of the first Alien registration in 1940, I was advised and consulted by the official at the German Consullate in New York, N. Y., to state on my registration form that I was not a member of this NATIONAL SOCIALIST GERMAN WORKER'S PARTY. They stated that if anything happened to just deny membership in the party. They gave no further explanation that I recall.

I cannot recall the name of the particular individual who gave me this advice, but I know that he was an official in the German Embassy for he was in the Consul's Office at the time.

I believe that I told all of the information about myself including my membership in the German Vocational League while in Germany, to the Board that heard my case a short time ago. The only matters which I did not mention pertained to my application for membership in the above designated German Official Party. I know this party and the German State to be one and the same.

I have read the foregoing statement consisting of one and one-half typewritten pages, have signed the second page and initialed the other, and I acknowledge that all matters reported there are true and correct to the best of my knowledge.

Signature Fritz Gustav Rudolph

WITNESS:

Det. Samuel T. Dunn
Donald A. Rosen, F. B. I. Newark, N. J. 11-17-43

[fol. 339] EXHIBIT G-67A EVIDENCE

Newark, N. J.,
September 5, 1944.

I, FRITZ GUSTAV RUDOLPH, resident of 231 Harding Avenue, Teaneck, New Jersey, do make the following voluntary statements to Donald A. Rosen who has identified himself to me as being a Special Agent of the Federal Bureau of Investigation. He has told me that I do not have to make any statements and that any I choose to make may be used against me in a Court of law. These statements herein made are in addition to the information I related to Special Agents Rosen and Studebaker and which were incorporated in the written statement signed by me November 17, 1943.

I first want it understood that I filled out both the 1940 and 1942 Alien Registration forms myself. I received no aid in executing them. Anything I may have previously stated in connection with having been advised and assisted in filling them out is not correct. I must have been excited at the time I told anything to the contrary.

First, with reference to the form I executed in 1940 at which time I was assigned Alien Registration Number 5300560, I went to the Post Office at Teaneck, supplied the information requested to some person there who typed it on one of the forms and I signed the completed form. I felt that if I answered question 15 of that form correctly indicating that I was then affiliated with the N. S. D. A. P. (The National Socialist German Worker's Party also referred to as the Nazi party) it would hurt my family and that I would be interned. It is for that reason that I supplied information that I have not been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy [fol. 340] of a foreign government. I knew this answer to be a false answer but for the reason above stated gave it as the truth.

Next, with reference to my 1942 form which I filled out in my own handwriting about February 25, 1942, also at the Teaneck Post Office, I left the answers to questions 14 and 15 of that form blank indicating that I was not affiliated with the above named organization for the same reason

that I did not supply the correct answer in my 1940 form. I wish to again state that I did this all of my own volition without anyone telling me how or why I should do so.

I recall receiving invitations to a number of affairs given by National Socialist German Worker's Party but only attended two of such social affairs. The invitations came from the German Consulate at New York City. The only ones of these invitational affairs that I attended were the Christmas Party at Turn Hall in New York City in 1938, and the affair or memorial ceremony in 1939 at the same place commemorating the death of VON HINDENBURG. I cannot recall anything of significance that took place at either of these functions nor can I recall the number of persons in attendance.

I also received propaganda material from the German Library of Information but do not recall when I commenced receiving such material or when I stopped receiving same.

The remainder of the information supplied by me in my statement of November 17, 1943, with the exception of the one point concerning advising and assisting my execution of the 1940 and 1942 forms filled out by me as an Alien, is correct to the best of my knowledge and recollection. I [fol. 341] herein refer to the statement given by me to Special Agents Rosen and Studebaker on Nov. 17, 1943.

I have read this statement consisting of one and one-half pages of typewritten material, have signed both pages in attestation that all items reported herein are true and correct to the best of my knowledge and recollection.

Signed: Fritz Gustav Rudolph

Witnesses:

Donald A. Rosen, F. B. I. Newark 9-5-44.
John C. Firmin, Special Agent, F. B. I.

[fol. 342] IN UNITED STATES DISTRICT COURT

NOTICE AND GROUNDS OF APPEAL—Filed December 20, 1944

Names and addresses of appellants: Ferdinand Fiswick, 145 48th Street, Union City; New Jersey; Jacob F. Mayer, 215 Lawrence Avenue, Hasbrouck Heights, New Jersey; Fritz Gustav Rudolph, 231 Harding Avenue, Teaneck, New Jersey.

Names and addresses of appellants' attorneys respectively: Frederic M. P. Pearse, 744 Broad Street, Newark 2, New Jersey; Frank W. Jackson, 223 Orange Road, Montclair, New Jersey; James P. Lordi, 11 Hill Street, Newark, New Jersey; William V. Azzoli, 24 Commerce Street, Newark, N. J.

[fol. 343] Offenses: The defendants were charged in an indictment with conspiring to defraud the United States by filing false registration statements under the Alien Registration Act of 1940, Title 8, Section 452, *et seq.*

Sentence of Court:

Ferdinand Fiswick, Eighteen months in the custody of the Attorney General.

Jacob F. Mayer, One year and one day in the custody of the Attorney General.

Fritz Gustav Rudolph, Eighteen months in the custody of the Attorney General.

We, Ferdinand Fiswick, Jacob F. Mayer and Fritz Gustav Rudolph, the above named defendants-appellants, hereby appeal to the United States Circuit Court of Appeals for the Third Circuit from the judgment above mentioned, on the grounds set forth in the annexed grounds of appeal.

Dated—Newark, New Jersey, December 20, 1944.

Ferdinand Fiswick, Jacob F. Mayer, Fritz Gustav Rudolph, Defendants-Appellants.

[fol. 344] GROUNDS OF APPEAL

1. The Court erred in denying a motion to quash the indictment.

2. The Court erred in denying a motion to dismiss the indictment and to direct a verdict of not guilty at the end of the Government's case.

3. The Court — in denying a motion to dismiss the indictment and to direct a verdict of not guilty at the conclusion of the entire case.

Frederic M. P. Pearse, Attorney for Appellant, Ferdinand Fiswick. Frank W. Jackson, Attorney for Appellant, Jacob F. Mayer. James P. Lordi, Attorney for Appellant, Fritz Gustav Rudolph. William V. Azzoli.

[fol. 345] ASSIGNMENT OF ERRORS

Now come Ferdinand Fiswick, Jacob F. Mayer and Fritz Gustav Rudolph, and say that in the record, proceedings and judgment aforesaid there is manifest error and for assignment thereof say:

1. The trial court erred in denying appellants' motion to quash the indictment.

2. The trial court erred in refusing to dismiss the indictment and to direct a verdict of not guilty at the end of the government's case on the ground that the government had failed to prove the allegations in the indictment (R. 433).

3. The trial court erred in refusing to dismiss the indictment and direct a verdict of not guilty at the end of the entire case on the ground that the government had failed to prove the allegations of the indictment, and on the further ground that as the indictment charges a conspiracy to defraud the United States by false answers the proofs showed that if a conspiracy existed at all, it was a conspiracy to commit an offense against the United States and not a conspiracy to defraud the United States (R. 746).

4. The trial court erred in refusing appellants' motion to set aside the verdict and in arrest of judgment.

5. The trial court erred in charging as follows:

"There have been admitted into evidence certain statements, written statements and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy; and these admissions and statements [fol. 346] are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it. I have ruled that this is a continuing conspiracy, and with the exception of one defendant, to whom I shall advert later, I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of proving the conspiracy itself, but simply to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the conspiracy" (R. 771).

6. The trial court erred in refusing to charge the jury as requested by appellants as follows (Nos. 11, 14, 15, 17, 18, 19 by counsel for appellant Fiswick):

"11. If you find that the defendant Fiswick did not disclose in his registration statement that he was a member of the Nazi party in the United States because he did not believe or understand that he was a member and that he had only applied for membership in the expectation of returning to Germany, even though he continued to pay dues and that he honestly believed that he should say 'I have not' in completing No. 15 in his registration statement, then your verdict as to that defendant must be not guilty.

14. There is some proof of the burning of a card index system in the spring or early summer of 1940. This is no proof of the conspiracy as charged. This evidence was admitted as part of the proof offered to establish G-17 as a list of Nazi party members in the United States.

[fol. 347] 15. Before you can find a defendant guilty as charged in this indictment you must find (1) that he conferred with Draeger or Vogel or with someone in the office of the German Consulate with respect to registration under the act of 1940; (2) that in preparing his statement he intentionally followed the advice or instructions received at the Consulate to make a false statement concerning his membership or non-membership in the Nazi party and did not do so as his own and independent action or from motives of his own not the result of the advice or instructions received.

17. If you find that a defendant merely filed a false or inaccurate registration statement without consulting with or taking advice or instructions from named defendants or named co-conspirators such as Draeger or Vogel or other employees of the German Consulate, then your verdict as to that defendant must be not guilty.

18. There is no issue in this case as to whether or not the representatives in the United States of the Nazi party were engaged in activities to promote the interests and idealogy of the party in this country. The issue is whether or not the defendants here on trial conspired with other defendants or co-conspirators named in the indictment to fife

false alien registration statements required by the act of Congress of 1940 with respect to their individual activities, or their affiliation with or activities in (as a member, official of or worker for) the Nazi party either here or elsewhere. It is important that you keep the issue clear in your minds during your deliberation. For you to find that a particular defendant merely filed a false or misleading registration [fol. 348] statement is not sufficient to convict him of the charge. You must find that he not only deliberately filed such false or misleading registration statement with intent to deceive but that he did so as the result of an agreement entered into by him with one or more of the defendants or co-conspirators named in the indictment so to do.

19. In your consideration of the evidence in this case you must adhere strictly to the following rules, which I charge you as a matter of law:

(a) You are not to be persuaded by the fact that the Government of the United States is a party to this action, for I charge you that the Government is to be considered as any other party and its counsel as any other counsel for any other party.

(b) You must consider only the evidence in this case.

(c) You are to disregard answers of witnesses which the Court has directed to be stricken out at any stage of the trial.

(d) You are not to construe the denial by the Court of any motion made to dismiss this indictment as such a ruling is not to be construed by you as any indication of the guilt or innocence of the defendants.

(e) You must not indulge in speculation or pursue possibilities, probabilities, conjectures or suspicions as you are required to render a decision solely upon the evidence. You must render a verdict representing your real opinion and judgment.

(f) It is your duty to confer with your fellow jurors and discuss the evidence with them. The verdict which you [fol. 349] render must represent the real judgment and honest conclusion of each of you, and no one of you may surrender his earnest belief concerning the guilt or innocence of any of the defendants for the purpose of preventing a

disagreement or for the purpose of arriving at a compromise, notwithstanding the duration of this trial.

(g) During the trial from time to time various statements and arguments have been made by counsel both for the Government and for the defense. Such statements and arguments are not evidence and are not to be taken by you as evidence, no matter who made them. You and you alone are the sole judges of the facts in this case and upon you alone rests the responsibility of determining the guilt or innocence of the defendants here on trial, following my instructions only with respect to the law in the case as I have defined it for you.

(h) You must not permit suspicion to displace proof, and you must not permit passion or prejudice to enter into your consideration of the evidence in this case. And this last admonition is particularly important in times like these when patriotism is at a high pitch and many people have to a certain extent lost their mental poise. You as jurors should be extremely cautious when in a case like this you are required to pass upon the rights of these men on trial charged as they are with an offense affecting the welfare of the Government. (*United States* v. *Hall*, 256 Fed. 748 at 752)."

7. The trial court erred in refusing to charge the jury as requested by appellants as follows (Nos. 1, 3 by counsel for appellant Rudolph):

[fol. 350]. "1. A conspiracy at Common Law has generally been defined as a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. 15 C. J. S. Sec. 38 page 1061.

3. Mere knowledge, acquiescence or approval of the act, without cooperation or agreement to cooperate is not enough to constitute one a party to a conspiracy.

U. S.—*Zito* vs. *U. S.*, 64 F. 2, 772.

In order to constitute the offense so far as combination is concerned, there must be a meeting of the minds, all the parties working together with a single design for the accomplishment of the common purpose.

Thomas vs. *U. S.*, 57 F. 2d 1039;

Young vs. *U. S.*, 48 F. 2nd 26.

But that there must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.

U. S.—Marino vs. *U. S.*, 91 F. 2d 691;
Blumerthal vs. *U. S.*, 88 F. 2d 522.

It has been said that if different groups of persons although having a similar general purpose, co-operate without any privity with each other but towards wholly separate ends, even though similar in character, the combination does not constitute a single conspiracy.

[fol. 351] 8. The trial court erred in permitting the witness Robert L. Bell to testify as to conversations with Jacob Friedrich Mayer, which testimony was to be binding on all of the defendants (R. 218, 221, 226).

9. The trial court erred in refusing to strike all of the testimony of the witness Robert L. Bell (R. 274-280).

10. The trial court erred in allowing the statement of the defendant Mayer, G-56, in evidence (R. 309).

11. The trial court erred in admitting in evidence Exhibits G-2 through G-41, both inclusive, G-43 through G-55, both inclusive, G-57, G-58, and G-59 for the reason that the same were hearsay and not binding upon the appellants and not relevant to the issues herein, were immaterial to the issues herein and did not support the charge in the indictment.

Frederic M. P. Pearse, Attorney for Defendant-Appellant Ferdinand Fiswick. Frank W. Jackson, Attorney for Defendant-Appellant, Jacob F. Mayer. William V. Azzoli, Attorney for Defendant-Appellant, Fritz Gustav Rudolph.

[fol. 352] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8864

UNITED STATES OF AMERICA, Plaintiff,

vs.

FERDINAND FISWICK, JACOB F. MAYER and FRITZ GUSTAV RUDOLPH, Defendants-Appellants

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 26th day of July A. D. 1945, it is ordered that Hon. Curtis L. Waller, U. S. Circuit Judge, for the Fifth Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Assigning Hon. Curtis L. Waller for Argument. Received & Filed July 26, 1945. William P. Rowland, Clerk.

[fol. 353] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1945

No. 8864

UNITED STATES OF AMERICA

vs.

FERDINAND FISWICK, JACOB F. MAYER and FRITZ GUSTAV RUDOLPH, Appellants

And afterwards, to wit, the 26th day of July, 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Curtis L. Waller and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 10th day of December, 1945, come the parties aforesaid by their counsel aforesaid,

and the Court, now being fully advised in the premises, renders the following decisio' :

[fol. 354] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8864

UNITED STATES OF AMERICA

vs.

FERDINAND FISWICK, JACOB F. MAYER and FRITZ GUSTAV RUDOLPH, Defendants-Appellants

On Appeal from Judgments of the District Court of the United States for the District of New Jersey

Before Biggs, Waller and McLaughlin, Circuit Judges

OPINION OF THE COURT—Filed December 10, 1945

By McLAUGHLIN, Circuit Judge:

Thirty-one persons of Ger an nativity were indicted in the District Court of the United States for the District of New Jersey on September 13, 1944. Six entered pleas of guilty. There was a dismissal as to one, a severance as to fourteen, a trial as to ten, an acquittal as to three, a mistrial as to four and a conviction as to the three who have appealed.

[fol. 355] The indictment alleged that during the summer of 1941, and for five years immediately preceding, Friedhelm Draeger was the German Consul in the City of New York and Kreisleiter, or leader, of the overseas portion of the National Sozialistische Deutsche Arbeiterpartei, hereinafter referred to as the Nazi Party, in the United States; that during the same period Hans Vogel was secretary to Draeger; and that the said Consul and secretary were engaged in matters concerning the operation of the Nazi Party and its members and activities in the United States; that each defendant was a German National and a member of and affiliated with the Nazi Party; that the Alien Registration Act of 1940 (Title 8, U. S. C., Sec. 452, et seq.), and the regulations issued thereunder, required each of the defendants to register and to furnish information, among

other things, as to the existence, kind and extent of his membership in the Nazi Party to the end that the United States, in the exercise of its governmental functions, might have accurate and complete information during the national emergency; that the defendants conspired illegally with Draeger and Vogel and with each other and with others to the grand jurors unknown, to defraud the Government of the United States by denying, falsifying, concealing, misrepresenting, etc., membership in such Nazi Party so as to defraud, hamper, impede, impair, frustrate and obstruct the United States in obtaining accurate information as to their membership and activities in, their affiliations with, and the activities of the Nazi Party, its clubs, organizations, functions and activities in the United States; that Friedhelm Draeger, Hans Vogel, the German Ambassador, members of his staff, and others to the grand jurors unknown, would advise, counsel, instruct, command and direct the defendants and others similarly situated to deny, deceive and misguide the United States in reference to their membership or affiliation in said Nazi Party in filling out the form required of each of them under the regulations pursuant to the Alien Registration Act of 1940; that it was part of the [fol. 356] conspiracy that these defendants and other members and affiliates of the said Nazi Party within the United States, would continue after the Fall and early Winter of 1940, and from day to day thereafter to the date of the bringing in of the indictment, to deny, falsify, deceive and misrepresent to the United States their agencies, departments and bureaus, the material facts relating to the existing kind and extent of their membership and activities in, affiliation with, and the existence and activities and functions of the said Nazi Party within the United States, to the end that the denials, concealments, falsifications, misrepresentations, suppressions and equivocations made in connection with the above referred to Alien Registration Act of 1940 would continue thereafter to the detriment and failure of the United States and their agencies, departments and bureaus, to ascertain fully, fairly and accurately during a National emergency, information relating to the membership, policy and activities of these defendants and others in the Nazi Party in the United States, and for the furtherance of the political activities, public relations, public policy of the Government of the Third German Reich, all of which information in said form under said Act of Congress was

vital to the internal security of the United States; that the defendants would appear before proper alien registration officers and authorities for the purpose of registration, and in such registration would falsely and fraudulently omit to disclose and truly state their membership in, and connection and affiliation with, the clubs, societies, organizations and activities of, the Nazi Party within the United States; and numerous overt acts were set forth and alleged to have been committed in pursuance of, and in order to effect the objects of, said conspiracy. Defendants were not indicated for the substantive offense of false registration as was done in the case of United States vs. Heine, 149 F. 2d 485.

There was testimony for the Government by Miss Lilly Illian, an employee of the German Consulate from March, 1939, until May, 1941, that Dr. Draeger, the [fol. 357] Consul, was Kreisleiter, or leader, of the Nazi Party in New York; that Hans Vogel was secretary to the Consul; and that a part of her duties was taking dues of the members of the Nazi Party and taking care of correspondence pertaining to it; that Vogel dictated to her generally and that occasionally so did Dr. Draeger; that applications for membership in the Party were taken at the German Consulate and thereafter transmitted to Germany with a report by the Consul; that records were kept at the Consulate pertaining to members of the Party and application for membership therein; that the total amount of initiation fees, etc., was $15.50; that there were also dues of $1.00 per month; that the final acceptance of an application for membership had to come from Germany, but applicants for membership received a card and members received a book in which stamps could be placed showing payment of dues; that meetings and activities were held either in the Consulate or under its auspices; that a list had been made up from the file cards which were once kept in the Consulate but later destroyed; that Vogel advised her the file cards had been burned in the early part of 1940; that witness could not identify either one of the three convicted appellants but three names identical with those of the three defendants were on the list of Party members; that after the registration of aliens in the United States was required, the Consulate, either through Dr. Draeger or Hans Vogel or herself, gave instructions to the members as to the wording that should be used in filling out the registration statement; that the members were first instructed by Dr. Draeger to

deny membership and not to put the fact that they were members of the National Socialist Party in the Registration questionnaire; that they were later advised to send an amendment of their answers to the State Department wherein they should state that they were non-resident members of the Nazi Party; that some of the defendants were instructed to state in their questionnaires that they were members of the Reichsdeutsche Vereinigung. All [fol. 358] three of the appealing defendants, acting on such advice, in answering their questionnaires denied that they ever had, within five years, belonged to or been affiliated with, or an active member of, any organization devoted to political activities, public relations, or public policies of a foreign government, with the exception of defendant Jacob L. Mayer, who, on such advice, stated that he was a member of the Reichsdeutsche Vereinigung. (He later admitted that he had never heard of that organization before and that he had been advised by the Consul to say that it was a welfare organization.)

There was testimony by Gustave Gauerke, an employee of the Consulate, which corroborated a part of the testimony of Miss Illian. Emil Wilhelm Borchers, a defendant, also testified that he was a member of the Nazi Party and that Vogel advised him, and three others who were with him at the Consulate, that when a member of the Nazi Party registered he should not state that the Party was organized, nor that he was a member thereof, and that he should turn in his Nazi membership book or card to the Consulate; that he did this; that he had attended functions at which Dr. Draeger and Hans Vogel were present, at which Dr. Draeger began the exercises with the "Heil Hitler" greeting and the Hitler salute. Witness Albert J. Komecki testified as to certain activities of the German-American Festival Committee, which were under the supervision of the Consulate.

The Government next introduced as a witness Mr. Bell of the F. B. I., who testified, over objections, as to conversations he had had with the defendant Mayer on the 22nd and 23rd of November, 1943, wherein certain admissions were made by that defendant. In the first interview Mayer denied, according to the witness, that he was a member of the Nazi Party, but on the succeeding day Mayer admitted that he was a member and that he had been advised by the Consul to deny membership when filling out the registration

statement and to state that he was a member of the Reichsdeutsche Vereinigung. A statement by Mayer to the same effect as his oral testimony was received into evidence.

[fol. 359] Other F. B. I. agents later testified as to conversations with and written statements by the defendants, Fiswick and Rudolph, which latter also went into evidence. Fiswick on April 29, 1944, in talking with the particular F. B. I. representative, stated to that person that he had told an Enemy Alien Hearing Board at Newark, New Jersey on January 7, 1944, that he was not a member of, or a prospective member of, the Nazi Party in the United States. He stated that he had also been interviewed by agents of the Newark office of the F. B. I. and had told them that he was not a member of, or a prospective member of, the Nazi Party. He also told the agent then questioning him, in the beginning of the interview, that he was not a member of, or a prospective member of, the Nazi Party. It was following that, according to the agent, that Fiswick said he desired to tell the truth and would feel a lot better if he got the thing off his mind and then proceeded to tell everything that is contained in the signed statement. The signed statement sets out that Fiswick joined the Nazi Party in 1933 filling out the application in the presence of Hans Vogel, that he recognized Adolph Hitler as the leader of the German Reich and agreed to obey the laws of the German Reich. It goes on to say that in 1940 Vogel told him and four others it was not necessary to state on the registration form that they were members of the Nazi Party and that he followed those instructions. It then reads that in April or May of 1941 he attended a Nazi meeting at the New York German Consulate at which the Consul advised that the Consulate was closing and that war was possibly coming and that all the members should obey the laws of the United States and that they should destroy their membership cards; Fiswick destroyed his prospective member's card; he also burned his last German passport as it showed that he had registered with the German Consulate for military service in 1939.

The defendant, Rudolph, at the trial below repudiated a statement which he had given on November 17, 1943 [fol. 360] wherein he admitted that he had been advised by a German Consular official to state on his registration card that he was not a member of the Nazi Party and if anything happened to deny membership in that Party with other

matters in the statement more or less supporting the indictment.

As stated the question of the admission of the above referred to conversations and statements into evidence first arose in connection with Mayer's statements, oral and written. The District Judge at the time held there was sufficient evidence for the jury to consider in order to infer the existence of a conspiracy. He said further: *"I cannot find myself and the Government would not wish me to find as a matter [of] fact that the Government has proven the existence of a conspiracy because I would then be assuming the functions of the jury."* (Emphasis ours) The statements were at first admitted only as to the individual defendants making them. While of no prime importance in view of what happened later, Fiswick at least seems to have consented to this, with his attorney saying at page 190a of the record: "And of course I am consenting to the admission of these statements only as to the individual defendants, if the court please, whom they may affect."

Later, on the motions for dismissal, the Court allowed the statements in evidence generally against all the defendants on the Government's theory of continuing conspiracy.[1]

[1] The Court said as to this, page 205a of the record:

"The Court: Now, in order that there may be no mistake, a question has risen which I conceive to be novel, as to whether or not there is a continuing conspiracy without a positive act; I am ruling *that the conspiracy continued to the date of the return of the indictment,* because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, *and that there is such continuous cooperation.* That has been the determination of the Supreme Court where there was an act of commission; I am now extending it to a situation whereby cooperation may be indicated by failure to do some act to indicate a desire to bring to an end the continuing situation effected by the act previously done. Under that ruling, and in order that there may be no further mistake, I shall rule that all the statements which were made by each of the defendants, although they were made after 1940, will be admissible against each of the other alleged co-conspirators." (Emphasis is ours.)

[fol. 361] In his charge the Court said regarding this:

> "There have been admitted into evidence certain statements, written statements and verbal admissions *made by conspirators,* of *activities done in furtherance of the object of the conspiracy;* and these admissions and statements are admissible against all of the co-conspirators if made during the *continuance of the conspiracy and during their participation in it.* I have rule- that *this is a continuing conspiracy,* and with the exception of one defendant, to whom I shall advert later, I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of proving the conspiracy itself, but simply to prove acts and course of conduct which would be chargeable to *the other co-conspirators,* because done, *or if done,* done in furtherance of the object of the conspiracy." (Emphasis ours)

Before coming to the main question it might be well to dispose of another situation arising from the same part of the charge above quoted. The trial was rather long drawn out. It was hard fought by both the attorney for the Government and those for the defendants. A careful reading of the record and of the briefs shows that the Court's reason for letting the statements generally into evidence was thoroughly understood by defense counsel. What they objected to and now stress as error was the Court's holding that whether there was a conspiracy and if so, whether it continued as charged, were jury questions. It is urged that there was no proof of the conspiracy and even assuming that there was, that there was no proof of a continuing conspiracy. The appellants say that at most there was evidence of a concluded conspiracy with a continuing result. It is that problem which presents the real issue. Therefore [fol. 362] while the portion of the charge quoted standing alone might create the impression that the Court gave the jury as a fact the continuance of the conspiracy and so took the latter's existence for granted, it does not so develop when the entire circumstances are examined. The Trial

Judge clarified the language later to the expressed satisfaction of the jury when he said:

> "Here is what I said, that the acts or admissions of each of the co-conspirators are admissible as evidence against all of the other co-conspirators *provided you find that there was a conspiracy and that they were all in it.* Of course if you find that any particular individual defendant was not in this common agreement that the indictment alleges existed, then he would be immediately out of the situation. Does that clarify it?
>
> "The Foreman: Quite clear." (Emphasis ours)

Further indication that the jury understood they had to first pass upon the question of whether there was a conspiracy is shown by the language of the foreman addressing the Court on request for instructions where he said:

> "The Foreman: A question came up, your Honor on that. We are all well aware that Dr. Draeger and Hans Vogel and Zeglin are mentioned in the indictment as conspirators, *and if we find a conspiracy* existed we would then conclude that at least those three were in it in the beginning." (Emphasis ours)

The meticulous differentiation in the verdicts itself points to the jury's proper grasp of the scope of their inquiry. That the attorneys for the defendants had a correct appreciation of the Court's position is shown (a) by no exception to that part of the charge; (b) in their brief (bottom of page 31) interpreting the particular language of the Court, they say:

> "However, in this case, the Court *went much further and held that* there was *proof* that a conspiracy existed [fol. 363] and continued down to the time of the filing of the indictment * * *." (Emphasis ours)

As seen, their quarrel with the Judge is that he held there was *proof* of a conspiracy and of its continued existence. The appellants do not pretend that the Court at any time meant to imply that the continuance of the conspiracy and therefore the conspiracy itself had to be assumed by the jury. (c) The above quotation from the charge is made the subject of appellants' Point IV. As

stated, no exception was taken to this. It is included, however, on the theory that it comes within the first exception which reads: "I take exception on behalf of all defendants to that portion of your Honor's charge with respect to the admission in evidence of the statements of the defendants and their binding effect upon the other defendants." The argument urged is illuminative as to what the language meant to the defense. It reads:

> "The foregoing, it will be observed, is an instruction to the jury *as to what effect the statements or admissions of the defendants may have upon the minds of the jury in its deliberations and in determining whether or not there was a conspiracy, whether or not it was a continuing one and whether or not any of the defendants had any part in it.*
>
> "For the reasons which we have heretofore set forth in other points we submit that this part of the Court's charge was prejudicial error." (Emphasis ours)

In other words, as the case finally went to the jury it seems conceded, certainly from the record it is what happened, that the Court left to the jury the questions of whether there was a conspiracy and if so, whether such conspiracy continued.

The dates of the talks with Mayer and of his statements were November 22 and 23, 1943; those as to Fiswick were April 29, May 19 and May 26, all in 1944; and as to Rudolph they were November 17, 1943 and September 5, 1944. The [fol. 364] indictment was filed September 13, 1944. Mayer, the last defendant to register, did so on December 23, 1940. It is argued that the last overt act took place when Mayer registered and that the conversations with the defendants and the giving of their statements occurred years after the conspiracy must have ended. This completely overlooks not only the theory of the Government's case but the plain language of the indictment. The scheme did not end with false registration. The latter was essential but to accomplish the end result the concealment of Nazi membership had to be affirmatively maintained thereafter. A continuing conspiracy was specifically charged with the proof presented by the Government making it a jury question whether there was such a conspiracy. It is true that the evidence

was all pretty much circumstantial but if it — believed, it presented a pattern of deliberate and important hostile fraud on the United States. The three sets of admissions are part of this. In the Mayer episode on November 22, 1943, he denied he was a member of the Nazi Party. The next day he admitted he was such a member together with other details which fitted in with the indictment. In other words, Mayer as late as November 22, 1943, in denying his Nazi membership, did something which could have been believed by the jury to have been an overt act in the alleged continuing conspiracy and which was some evidence that he was still following the plan and furthering the conspiracy. The same applies to Fiswick who on April 29, 1944 denied his Nazi Party membership and later in the same interview admitted it and then revealed the method used as to registration. The reverse of the medal is presented with Rudolph. The jury could have concluded that he persisted in actively maintaining the conspiracy down to the extent of testifying at the trial that he had never received or followed registration instruction and so denying an earlier admission. If accepted by the jury, and the verdicts indicate that it was, the above referred to evidence of the appellants [fol. 365] is some proof of specific overt acts in furtherance of the plan conceived and partially executed in 1940.

There is no dispute as to the governing law. It is stated in United States v. Kissel, 218 U. S. 601 at 607:

> "But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators, to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one."

This has been followed in Brown vs. Elliott, 225 U. S. 392; Culp vs. United States, 131 F. 2d 93 (C. C. A. 8), Lonabaugh vs. United States, 179 F. 476 (C. C. A. 8), Breese vs. United States, 203 F. 824 (C. C. A. 4), Shaw vs. United States, 41 F. 2d 26 (C. C. A. 5), Eldredge vs. United States, 62 F. 2d 449 (C. C. A. 10). The converse of the above rule is just as strongly supported by those opinions, namely, that

a continuing result of itself does not change the conspiracy into a continuing one. It is the nature of the agreement rather than the acts of the parties that determines if the conspiracy is a continuing one. The instant indictment charges a continuing agreement between the conspirators from prior to 1940 down to the date of the indictment. That was the foundation of the indictment and of the Government's evidence. It was on that theory that the statements by and the conversations with the defendants were allowed.

Several other reasons are suggested for barring the conversations and statements. There is nothing in the record arising from the fact that the defendants were in the custody of the F. B. I. at the time which justifies attack on the admissibility of the evidence because of that circumstance. Of course, if the conspiracy had been abandoned prior to the conversations and statements, the latter would have been inadmissible generally but as shown both the conversations and statements pointed to the then present [fol. 366] existence of the conspiracy. Nor do we think that it can be maintained that the conversations and statements must be in destruction of the conspiracy. That might be one conclusion but the jury could also have inferred that as late as the trial Rudolph by denying his earlier statement, was still affirmatively aiding the scheme set out in the indictment. The same thought applies to Mayer down to November 22, 1943 and to Fiswick until April 29, 1944. The conversation of Mayer with the F. B. I. and his statement, should be examined together. The same course is to be taken with the conversation of Fiswick and his statements and with Rudolph's statement and his testimony at the trial. When this is done all three groups can be reasonably interpreted to imply deliberate concealment of Nazi Party membership down to the mentioned dates. It is not difficult to accept the so-called confessions as part of the acts which furthered the conspiracy when it is remembered that as to Mayer and Fiswick, their confessions coupled with the immediately preceding denials and as to Rudolph, his trial repudiation of his confession all give some indication at least that there has been a continuing affirmative fraud on the United States.

If we are correct that the conversations with and the statements by the defendants, including Rudolph's testi-

mony, are evidence of the continued functioning of the plan of not disclosing information and of giving false information, then there is no difficulty with respect to the statute of limitations. The jury by its verdict obviously believed as they were entitled to, that they were dealing with a crime which continued right into the trial itself and therefore cases such as United States vs. Irvine, 98 U. S. 450 and Meyer vs. United States, 220 F. 800 (C. C. A. 9) do not apply. Compare United States vs. Alfano, — F. 2d — (C. C. A. 3).

Discussion of continuing conspiracy necessarily includes the basic question of conspiracy as charged in the indictment and as to the latter the same lack of direct testimony exists particularly with reference to conspiracy between [fol. 367] the defendants. We agree that the Government's obviously difficult burden is no excuse for lack of proof. However, under the evidence and the legitimate inferences therefrom clearly the conspiracy issue was also for the jury.

An exhaustive examination of the record reveals that the District Judge and the jury were careful in seeing to it that the defendants were given a fair trial. There was no final confusion or misunderstanding by the jury or by defense counsel with respect to the law of the case as pronounced by the Court. We find no error of any substance.

Affirmed.

WALLER, *Circuit Judge*, dissenting:

It was necessary for the Government to prove that the Appellants entered into a conspiracy between September 1, 1939, and December 23, 1940 [the date of the last overt act of either defendant], with persons in the diplomatic and consular service of the Third Reich, and with each other, and that the conspiracy so entered into continued until September 13, 1944, the date of the bringing of the indictment. Not only had the Government made these allegations in its indictment, but it put in evidence, over the objection of the Defendants, confessions signed by the Defendant, Rudolph, dated November 17, 1943, and September 5, 1944, as well as admissions or confessions by the Defendant, Mayer, dated November 23, 1943, and

by the Defendant, Fiswick, the last of which was dated May 26, 1944. Each of the Appellants, on those dates, made signed statements to the F. B. I. stating their connection with the events and things involved in the case.

If the Government failed to prove that the alleged conspiracy was in continuation on September 5, 1944, the date of the last statement by Rudolph, then it was error to permit any of the statements to be received in evidence against any other alleged conspirator, for it is well established that [fol. 368] if the conspiracy had been terminated prior to the date of the confession an admission or a confession by one conspirator, made after termination of the conspiracy, *and, therefore, not* in furtherance thereof, cannot be received in evidence against any other alleged co-conspirator unless the admission or confession was made in the presence of such other conspirator.

These confessions were each permitted to go in, over appropriate objection, as evidence against all of the Appellants, notwithstanding the fact that the statements could in no wise have been in furtherance of a conspiracy in that they were each made to the F. B. I. in full revelation, termination, and frustration of a conspiracy whose chief object had been the concealment of the same facts as revealed by the confessions.

Rudolph registered Dec-mber 3, 1940, Fiswick registered December 4, 1940, and Mayer registered December 23, 1940. Mayer's registration is the last overt act by any of the Appellants shown to have been in furtherance of the conspiracy. The statute of limitations began to run from the date of the last overt act. Brown vs. Elliott, 225 U. S. 392; U. S. vs. Bradford, 148 F. 413; U. S. vs. Reddin, 193 F. 798. A conspiracy, once entered into, is kept alive by overt acts, and each new overt act is a renewal of the conspiracy. There being no proof of any further overt act by either Appellant after December 23, 1940, the Government failed to show a continuation of the conspiracy subsequent to the date of the last overt act. Not only is there no proof of any continuation of the conspiracy after the last overt act, but the Government's own evidence shows that the German Consul notified the Defendants—at a time prior to May, 1941, at which date the Government's chief witness, Miss Illian, left employment in the German Consulate—to amend their registration statements

by writing to the Immigration and Naturalization Service and stating:

> [fol. 369] "However, in order to avoid any misunderstanding I wish to amend my registration so that the same shall show that I am a non-resident member of the National Socialistic German Labor Party since ————, but have not been actively engaged in any way in said party, or on its behalf, and am not engaged in political activities in this country."

There is no proof in this record that either one of the Appellants was at the time of the registration, or ever had been, anything more than a non-resident member of the National Labor Party. The German Consul was the hub of the wheel in the conspiracy. Neither of the Defendants ever saw or talked with any other Defendant. All of their contacts were with personnel in the German Consulate. Whatever part in any conspiracy these Defendants had was by, with, and through the German Consulate. The evidence shows conclusively that some time prior to the date Miss Illian left the Consulate in May, 1941, the German Consul, the sine qua non of the conspiracy, undertook to end the period of secrecy by advising all members of the Party to file the amended registration statement above quoted, thereby abandoning the conspiracy to keep the United States from finding out who were members of the National Labor Party of the Third Reich.

Notwithstanding that the last overt act was shown to have been committed on December 23, 1940, and notwithstanding the fact that prior to May, 1941, the German Consul had advised all members to file the amended statements showing their non-resident membership in the foreign political party, the trial Court ruled:

> "I am ruling that the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there is such continuous cooperation."

He reasoned that since there was a continuing result there was a continuing conspiracy "to the date of the re-[fol. 370] turn of the indictment," notwithstanding the

fact that the record shows, without dispute, that the Defendant, Mayer, on November 23, 1943, Fiswick, on May 26, 1944, and Rudolph, on November 17, 1943, each told the F. B. I. the facts so that it cannot rightly be said that any complicity by either Appellant in the conspiracy had continued to the date of the indictment on September 13, 1944. When these Appellants made their confessions to the F. B. I. they necessarily thereby terminated any part in a conspiracy to deprive the Government of the information revealed by such admissions. The confessions were made long before the bringing of the indictment.

Each of these statements was received in evidence as against each of the other alleged conspirators, notwithstanding the fact that neither of the statements was in furtherance of the conspiracy but in its destruction or frustration. Admission of the statements was objected to on the following, as well as other, grounds: (a) that the alleged conspiracy, if any had ever existed, had long since been completed and terminated before the admissions were made; (b) that in any eventuality a statement, not in furtherance of a conspiracy, made by any one Defendant could in no wise be admissible against any other alleged conspirator. These objections were overruled, the Court holding, as a matter of law, that the conspiracy had continued to the date of the return of the indictment, saying:

> "Now, in order that there may be no mistake, a question has arisen which I conceive to be novel, as to whether or not there is a continuing conspiracy without a positive act; *I am ruling that the conspiracy continued to the date of the return of the indictment*, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, *and that there is such continuous cooperation.* That has been the determination of the Supreme Court where there was an act of commission; I am now ex- [fol. 371] tending it to a situation whereby cooperation may be indicated by failure to do some act to indicate a desire to bring to an end the continuing situation effected by the act previously done. Under that ruling, and in order that there may be no further mistake, I shall rule that all the statements which were made by each of the defendants, although they were made after

1940, will be admissible against each of the other alleged co-conspirators." (Emphasis is added.)

Exceptions were properly made, allowed, and sealed. The Court in its general charge also stated to the jury:

> "There have been admitted into evidence certain statements, written statements and verbal admissions *made by conspirators*, of *activities done in furtherance of the object of the conspiracy;* and these admissions and statements are admissible against *all of the co-conspirators* if made during the *continuance of the conspiracy and during their participation in it.* I have ruled that *this is a continuing conspiracy*, and with the exception of one defendant, to whom I shall advert later, I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of proving the conspiracy itself, but simply to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to *the other co-conspirators*, because done; or if done, done in furtherance of the object of the conspiracy." (Emphasis is added.)

The foregoing charge to the jury had these serious vices:

(a) It advised the jury that the verbal admissions *were made by conspirators.*

(b) It advised the jury that the activities of the makers of the admissions *were done in furtherance of the objects of the conspiracy.*

(c) It advised the jury *that there was a conspiracy.* Otherwise nothing could have been done in furtherance thereof.

[fol. 372] (d) It advised the jury that *the Court had ruled* that *it was a continuing conspiracy*, with the exception of one Defendant.

(e) It advised the jury that the admissions of any Defendant was evidence against all others.

(f) It advised the jury that the statements were admitted to prove acts and course of conduct on the part of

the individual making the statement which would be chargeable to *the other co-conspirators.*

(g) It advised the jury that the conspiracy continued to the date of the indictment.

A judge cannot say to the jury that a defendant is a "conspirator" or a "co-conspirator" without telling the jury that "there was a conspiracy". The judge cannot tell the jury that this is a "continuing conspiracy" without telling the jury that "this is a conspiracy". The judge cannot tell the jury that "activities were done by conspirators in furtherance of the object of a conspiracy" without telling the jury that "there was a conspiracy".

Moreover, as we have demonstrated heretofore, there is not the slightest evidence in this case, other than the silence of the Appellants prior to their confessions to the F. B. I., of the continuance of the conspiracy. Neither a conspiracy nor its continuance can be proven by the mere failure of a defendant to make a report to the officers.

This charge to the jury was the equivalent of a peremptory instruction to convict the Defendants.

So the question of whether or not there was proven any concert of action, common understanding, community of purpose, or agreement between the defendants—"together and with each other" as alleged in the indictment—as was necessary in order to show that Defendants were members of the alleged general conspiracy as distinguished from small and separate conspiracies between each one and persons in the Consulate—was wholly for the jury; as were also the questions as to whether or not there was any intent to defraud; or guilty knowledge, or agreement or common [fol. 373] understanding; or whether the failure of the Defendants truthfully to answer their questionnaires was intended to be in furtherance of the general conspiracy or for the separate and independent ends of any Defendant; or whether any of the Defendants had abandoned the conspiracy on or before making the admissions; or whether or not the conspiracy had ended when all of the Defendants had registered or when they were advised by the Consul to file a corrected statement saying that they were non-resident members of the Nazi Party, or when they made their true statements to the F. B. I.; and whether or not admissions by any Defendant were made by him as a

member of a then existing conspiracy and in furtherance thereof.

These were questions over the answers to which the minds of reasonable men might differ and which answers only the jury could make from the facts and circumstances in evidence.

A statement made by a member of an existing conspiracy, out of the presence of another conspirator, cannot be used againts the other conspirator, unless such statement is made in furtherance of the objects of the conspiracy, or in and about the business of the criminal partnership.[1] I reiterate, a statement made in giving the facts to the F. B. I. cannot possibly be held to be in furtherance of a conspiracy which conspiracy has for its chief object the suppression of those same facts.

Nevertheless, the lower Court advised the jury; "There have been admitted into evidence * * * written statements and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy" and that they were, therefore, admissible against all Defendants if made during the continuance of the conspiracy and during their participation in it. He then [fol. 374] peremptorily told the jury: "I have ruled that this is a continuing conspiracy", thus telling the jury that there had been a conspiracy and that the statements by the Appellants were made during its continuance.

The Court below, in declaring that the conspiracy had continued until the bringing of the indictment, evidently overlooked the fact that such a holding required it to assume the prior existence of the alleged conspiracy.

The following statements seem so axiomatic as not to require citation of authorities in support:

(1) The existence, vel non, of a conspiracy is for a jury.

(2) Whether a conspiracy has continued is a question for the jury.

---

[1] "Acts and declarations of alleged co-conspirators are in a proper case admissible in evidence to establish the conspiracy. Such acts or declarations, if made or done in the absence of the other conspirators, are not admissible unless they relate to, and are in furtherance of, the common design, * * *." 15 C. J. S. 1141 § 92.

(3) Whether any act committed by a defendant was in furtherance of the object of the conspiracy is for the jury.

(4) No act of an alleged conspirator may be shown except one that the jury would have the right to conclude was in furtherance of the conspiracy.

(5) No statement made by one alleged conspirator is admissible against one who was not present when the statement was made unless there was evidence tending to show that the absentee was a member of the conspiracy and that the statement was made in furtherance thereof.

(6) No statement made by a conspirator after the termination of a conspiracy is admissible against anyone but the maker.

(7) Proof only of several separate conspiracies between individual Defendants and the German Consul would be insufficient to establish the existence of a general conspiracy under an indictment which alleged that each Defendant conspired "with each other".

(8) The mere continuation of the results of a crime does not continue the crime. U. S. vs. Irvine, 98 U. S. 450; U. S. vs. Meyer, 220 F. 800.

[fol. 375] (9) To hold that a conspiracy was a continuing one because a result was continued without showing any overt acts since the hatching of the conspiracy would nullify the statute of limitations and permit a prosecution years after the statute had run, merely because the results might go marching on.

I am unable to agree with the opinion of the majority that no appropriate exception was taken to the charge by the Court that "this is a continuing conspiracy". The parties excepted when the Court made this ruling first as shown on pages 431 and 432 of the original record. Exception was also taken on behalf of all the Defendants to that portion of the charge "with respect to the admission in evidence of the statements of the defendants and their binding effect upon the other defendants".

This exception seems ample since it was only by reason of the Court's holding that a continuing conspiracy had been shown that the confession of any Defendant was admitted in evidence against the other Defendants. The ruling of the lower Court that a continuing conspiracy had been shown was the only reason for admitting the statements in evidence with a binding effect upon the other Defendants. The Defendants not only excepted to the Court's

charge to the jury but also excepted to the Court's first ruling which was made in the absence of the jury.

It is also true that when the jury became confused by the language of the lower Court in unequivocally stating that he had ruled that there was a continuing conspiracy and returned for further instructions, the Court then stated:

> "Here is what I said, that the acts or admissions of each of the co-conspirators are admissible as evidence against all of the other co-conspirators provided you find that there was a conspiracy and that they were all in it."

In view of the prior language of the Court, and in view of the fact that he again refers to the admission of "co-con- [fol. 376] spirators", the statement evidently is intended to refer to the question of who was in it, for he followed that by saying:

> "Of course, if you find that any particular individual defendant was not in this common agreement that the indictment alleges existed, then he would be immediately out of the situation."

The explanation does not explain. However, even if the jury was given to understand by the lower Court that it was their province to determine whether or not there existed a conspiracy and whether or not it continued to the date of the indictment, it was still reversible error to admit the confessions of the Defendants as against any Defendant other than the maker since it clearly appears that no confession was made either in the presence of another Defendant or in furtherance of the alleged conspiracy.

I think the judgment should be reversed and remanded for a new trial.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 377] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8664

UNITED STATES OF AMERICA

vs.

FERDINAND FISWICK, JACOB F. MAYER and FRITZ GUSTAV RUDOLPH, Appellants

Present: Biggs, Waller and McLaughlin, Circuit Judges

On Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the —— District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court in this case be, and the same are hereby affirmed.

By the Court, Gerald McLaughlin, Circuit Judge.

December 10, 1945.

Endorsements: Order Affirming Judgments. Received & Filed Dec. 10, 1945. Wm. P. Rowland, Clerk.

[fols. 374-377] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING—Filed January 9, 1946

Now come Ferdinand Fiswick, Jacob F. Mayer and Fritz Gustav Rudolph, defendants-appelants herein, by Frederic M. P. Pearse, their attorney, and respectfully pray the Court to grant a rehearing in the above entitled cause for the reason that in the majority opinion of the documentary evidence seems to have been overlooked as well as certain principles of law, and if the same had been considered, the Court might have reached a different conclusion and found that there were errors of substance committed by the trial court.

Defendants-appellants pray the Court for additional time within which to more fully set forth the reasons for this petition for a rehearing and a written brief and argument thereof.

Ferdinand Fiswick, Jacob F. Mayer, Fritz Gustav Rudolph, Petitioners. By Frederic M. P. Pearse, Attorney for Defendants-Appellants, Petitioners.

I hereby certify that this petition is presented in good faith and not for the purpose of delay.

Frederic M. P. Pearse, Attorney for Defendants-Appellants, Petitioners.

[fol. 378] ARGUMENT

(a) Concerning the scope of the scheme as charged.

The indictment under consideration, while charging a wide range of activities of the Nazi Party and filled with surplusage, is limited in the actual charge of an offense against the United States, and it is respectfully urged that the Court should not hold that "the scheme did not end with false registration" (Op. pg. 11). To particularize, while the indictment charges a conspiracy to defraud the United States and that the false registration statements of the individual defendants were only a *part* of the unlawful agreement, except for the statute of 1940 requiring registration by aliens, there would be no *unlawful* agreement. That, we urge is the limit of the unlawfulness. It may have been the theory of the government that the indict-

ment was broader in scope, but we urge that that theory is an erroneous one, and necessarily so, because of the language of the statute defining the substantive offense. We are supported in this view by the Circuit Court of Appeals of the Second Circuit in the case of *United States* v. *Ausmeier and 17 others*, decided November 21st, 1945 (No. 59 October Term, 1945). Convictions under a similar indictment as in the instant case, except for the names of the defendants, were under review by the Second Circuit, and we quote from that opinion as follows:

> "As Judge Thomas said in *Fulbright* v. *United States*, 91 F. (2d) 210 (C.C.A. 8), where 'knowledge * * * is made an essential element of the substantive crime * * * it must adhere in a charge of conspiracy to commit that crime.' Escape from that doctrine cannot be had through the suggestion that the conspiracy here was 'to defraud the United States,' [fol. 379] for here the conspiracy to defraud, if it existed, consisted of a conspiracy to have each defendant file statements known by him to be false."

The indictment charges a conspiracy not only to the extent that each defendant should file false registration statements concerning his activity and membership in the Nazi Party, but also, the defrauding of the United States with respect to "the activities of the said Nazi Party, its clubs, organizations, functions and activities in the United States." However there is nothing in the statute of 1940 or in the regulations promulgated thereunder, or in the alien registration form, which requires the individual alien to disclose *the acticities of a political organization.* Congress took care of that situation in the McCormack Act of 1938, and its amendments (Act of June 8th, 1938, 52 Stat. 631) and there is no charge in the indictment in the instant case against, nor is any Nazi organization named as a defendant or a co-conspirator.

Therefore, we urge that while it may be true that so far as the charge in the indictment is concerned that the "scheme did not end with false registration," that the scheme must be limited to that, and if so limited the admission in evidence of the statements of all ten of the defendants who went to trial, including the three who were convicted and who appeal, as proof not only of the conspiracy

but as proof of its continuance as well, was error, and on reconsideration by this Court we trust that this view will prevail.

While it may be true that the jury in considering the statements admitted in evidence, of any of the ten defendants who were on trial, might have found that each defendant or some of them, persisted in reaffirming their original misstatements made in 1940, surely by no stretch of the [fol. 380] imagination was there anything in those statements to justify the jury in believing that such reaffirmance by the individual could be an overt act binding upon the other defendants and in furtherance of a continuing conspiracy to violate the registration act of 1940. And it is urged that the trial court erred in permitting these statements to go to the jury and to spell from them proofs sufficient to support a verdict against any of the defendants.

(b) Concerning the continuance of the scheme as charged.

The Court, in its opinion (pg. 12), states:

> "It is the nature of the agreement rather than the acts of the parties that determines if the conspiracy is a continuing one. The instant indictment charges a continuing agreement between the conspirators from prior to 1940 down to the date of the agreement. That was the foundation of the indictment and of the government's evidence. It was on that theory that the statements by and the conversations with the defendants were allowed."

While the Court correctly stated the law in the first sentence of the above quotation, we say with great respect that the Court then misapplied those principles in the instant case. To be sure, the indictment charges a continuing agreement from September 1st, 1939 down to the date of the filing of the indictment (September 13th, 1944). Yet, how could the agreement charged possibly have been entered into in September 1939, almost a year before the Registration Act was passed (June 28, 1940) with no proof whatsoever of any connection between the defendants and the officers of the German Consulate (Draeger and Vogel), until the fall of 1940. Furthermore, outside of the evidence obtained from the statements of the defendants

[fol. 381] on trial, there is no allegation or proof of the commission of any overt act in furtherance of the conspiracy to violate the Registration Act, after December, 1940, when the last statement was filed. There is however affirmative proof in the government's case (see G-39) that although in the first instance, those who called at the consulate, were first advised or instructed not to disclose membership in the Nazi Party were later, but *prior to December, 1940* advised or instructed to amend their registration statements by stating that they were non-resident members of the National Socialist German Workers Party, which is the correct title of the organization commonly spoken of by the witnesses as the Nazi Party or the National Socialist Party (see Ex. G-2, 326a) which put an end to all secrecy in the matter. While it may have been the theory of the Court in admitting the statements as binding on all, because the indictment charged a continuing conspiracy, we submit that it is not the charge in the indictment that makes the individual statements admissible in evidence, or makes the original agreement, as alleged, a continuing one, unless by its very nature it can be such an one. We again urge that the indictment in the instant case falls within the same category as the indictment in the *Herbert* case (Appellant's brief, p. 34), and that the principles enunciated in that case should control.

Assuming that the agreement was proven without the use of the admissions subsequently made to the F. B. I., by December, 1940 it was in its very nature a *fait accompli*. There was nothing further to do or that could be done. The advice or instructions of Draeger and his underlings in the German Consul's office had been followed and the false registration statements were on file. It is not one of those agreements such as one in restraint of trade, or using the [fol. 382] mails to sell worthless securities, as illustrated by Justice Kalisch in the *Herbert* case. The agreement in the instant case is similar to a scheme to secure goods and credit by sending out false financial statements. The agreement to furnish false financial statements is the crime. The receipt of goods and credit is but the result. So again we urge that the principles laid down in the *Kissel* case apply in the instant case.

(c) Concerning the statements admitted in evidence.

The Court said (Op., p. 12):

> "Of course, if the conspiracy had been abandoned prior to the conversations and statements, the latter would have been inadmissible generally but as shown both the conversations and statements pointed to the then present existence of the conspiracy."

Again we urge that there is a total failure of proof of any cooperation whatsoever by the defendants with the German Consulate after December, 1940. There was never any proof of cooperation with each other. Therefore, how can it be said that a statement made by an individual defendant to the F. B. I., not in the presence of other defendant or defendants, either attempting to explain his registration statement or still denying that he was a member of the Nazi Party, having only *applied* for membership, is evidence of an overt act in furtherance of the conspiracy to file false registration statements and binding on his co-defendants, who never knew until the trial that such statements had been made. If there could be a conspiracy under the law to defraud the government by concerted efforts to deny the existence of the Nazi Party as such, or to deny activities by the Nazi Party in the United States at the time the statements were made, even then, in the absence of other proof, [fol. 383] such statements could not be used with any binding effort except upon the persons making them. But that is not the charge. The charge is simply an unlawful agreement by alien registrants, either with the advice or under the instructions of German officials in the United States, to conceal the membership of the individual in the Nazi Party and not to conceal either the activities or the existence of the Nazi Party itself.

We feel also that the argument may be validly advanced that in view of the Presidential Proclamation of 1942 requiring all alien enemies to re-register and to disclose the very same information concerning the individual registrant as that required in the registration statements of 1940, that any alleged continuing agreement to violate the act of 1940 ended when this new duty was imposed upon the individual defendants in this case. There is no allegation or proof in the instant case that the defendants conspired to file not only false registration statements under the 1940 Act, but

also under the 1942 Proclamation (see Title 50, U. S. C. A. Sec. 21). Nor is there the charge or the proof that they furnished untruthful information in the 1942 statements concerning membership in or affiliation with the Nazi Party. We do not have before us the statements in evidence of any of the defendants who were on trial except the three defendants who appeal, but our recollection is that the only statement that makes any reference to the 1942 registration is that by Rudolph (339a) that he filled out both registration statements without any help. Therefore, in the absence of any proof or any charge of the falsity of the 1942 statements, how can it be said that there could be any cooperation between the defendants to continue the alleged conspiracy of 1939-1940 when, as we have said before, a new duty was imposed upon each of them, similar in character by the Proclamation of 1942 and the statements required thereby. [fol. 384] The interruption created by law in 1942, it seems to us, answers any argument attempting to justify the trial court in admitting in evidence all of the statements made to the F. B. I., by the defendants on trial, in 1943 and 1944 from which the jury might find evidence of the continued existence of the alleged conspiracy of 1939-1940. As there is no proof or charge that the registration statements filed in 1942 were false or made in furtherance of the alleged conspiracy of 1939-1940, it seems to us that the accusation in the indictment fails for lack of proof and that the Court erred in giving the jury the opportunity to pass upon it.

(d) Concerning the Trial Judge's charge and exceptions thereto

The Court seems to feel (Op. p. 10) that counsel failed to take exception to the Court's charge as outlined in Point IV of our original brief. While we are well aware that a general exception to the charge of the Court avails nothing in the Federal Courts, nevertheless counsel have always felt that calling the Court's attention to a particular part of the charge, even though the language is not quoted, as long as there is an understanding between the Court and counsel as to what particular part of the charge is referred to in the exception, thus giving the Court an opportunity to correct it if the Court so desires, is all that is required. And we respectfully urge that there was no misunderstanding in the instant case, as the particular paragraph quoted in Point IV

of our original brief is the only paragraph which refers to the binding effect of the statements.

So far as the Trial Judge subsequently clarifying the language of the charge is concerned, in addition to the quotations appearing on page 9 of the Opinion, it will be noted that just before they were stated by the trial judge, in [fols. 385-386] answering a question by a juror concerning the defendant Nauert (306a), the Court had this to say:

> "• • • Now, you might attend to the evidence given by Miss Illian and other people who were not charged as co-conspirators and weigh that in its relation to Nauert, but in so far as the admissions of the defendants themselves were concerned, it is only Nauert's own admissions which may be used against him, and that admission, of course, of his may be used against all the other defendants; but theirs, in turn, may not be used against him, although they might be used against all of the others."

It may also be noted that the Court first charged the jury at 9:30 A. M. (285a) and that these further instructions were given almost twelve hours later (305a), after the jury had been struggling with its problems all day long. And while the foreman boldly expressed the view that it was "all quite clear" to him, while the Court's answers to the various questions propounded may have been quite clear to the foreman there is nothing to show that all was quite clear to the remaining members of the jury.

We respectfully submit that the instructions given to the jury after twelve hours of deliberation did not correct the original position taken by the Court both during trial and in the charge, that the statements made to the F. B. I. could be used by the jury not only in reaching its conclusions but in finding that there was a conspiracy as charged and that it was a continuing one.

Respectfully submitted, Frederic M. P. Pearse, Attorney for Defendants-Appellants.

[fol. 379] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8864

UNITED STATES OF AMERICA, Appellee,

v.

FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH, Defendants-Appellants

Sur Petition for Rehearing

And Now, to wit, January 26, 1946, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, January 26, 1946.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed Jan. 26, 1946. William P. Rowland, Clerk.

[fol. 380] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellants, as constituting the portions of the record before this court at argument; and proceedings in this court, in the case of United States of America vs. Ferdinand Fiswick, et al., Appellants, No. 8864, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 8th day of February, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the United States the one hundred and seventieth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 388] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 22, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

[fol. 389] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTED RECORD—Filed May 16, 1946

Subject to this Court's approval, It Is Hereby Stipulated And Agreed by and between the attorneys for the respective parties that for the purpose of review by this Court on certiorari, the printed record may consist of the following:

1. Appendix to brief for appellants in the United States Circuit Court of Appeals for the Third Circuit.
2. The proceedings in the United States Circuit Court of Appeals for the Third Circuit.
3. The order of this Court granting certiorari.
4. This stipulation.

It is further stipulated and agreed that petitioners will cause the Clerk of the United States Circuit Court of Appeals for the Third Circuit to file with the Clerk of this Court the complete, certified transcript of the record on appeal to the Circuit Court of Appeals for the Third Circuit, including exhibits.

It is further stipulated and agreed that either of the parties hereto may refer in his brief and argument to the com-

[fol. 390] plete transcript of the record filed in the office of the Clerk of this Court pursuant to this stipulation.

Dated: May 13, 1946.

Frederic M. P. Pearse, Attorney for Petitioners.

Dated: May 8th, 1946.

J. Howard McGrath, Solicitor General of the United States.

[fol. 391] [File endorsement omitted.]

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 4 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1945. No. 909 51

FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH,
Petitioners,
Appellants below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioners.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 3, N. J.

INDEX.

	PAGE
Petition for Writ of Certiorari	1
I. Summary Statement of the Matter Involved.	1
II. Questions Presented	3
III. Statement of the Case	3
IV. Statutes Involved	5
V. Reasons for Allowance of Writ	6
Brief in Support of Petition for Writ of Certiorari.	9
I. Opinion of the Court Below	9
II. Jurisdiction	10
III. Statement of the Case	10
IV. Argument	10
The trial court erred in holding that the conspiracy charged in the indictment continued after the last overt act was committed where the purpose of the conspiracy was to commit the same	10
Conclusion	13

STATUTES.

	PAGE
Title 8 U. S. C. Sec. 452(a)	4, 5
Title 8 U. S. C. Sec. 453(a)	4, 5
Title 8 U. S. C. Sec. 453(b)	4, 5
Title 8 U. S. C. Sec. 455(a)	4, 5
Title 8 U. S. C. Sec. 457(c)	4, 6
Title 18 U. S. C. Sec. 88	2, 6
Title 28 U. S. C. Sec. 347	10

CASES CITED.

Brown v. *Elliott*, 225 U. S. 392	6, 12
Hyde v. *United States*, 225 U. S. 368	13
United States v. *Ausmeier*, 152 Fed. (2d) 349	7
United States v. *Irvine*, 98 U. S. 450	6, 7, 12
United States v. *Kissel*, 218 U. S. 601	6, 12, 13

IN THE

Supreme Court of the United States

OCTOBER TERM 1945. No. .

FERDINAND FISWICK, JACOB F. MAYER, and
FRITZ GUSTAV RUDOLPH,
Petitioners,
Appellants below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States.

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit on the ground that the decision of the Circuit Court of Appeals as expressed in the opinion of a majority of that Court is in conflict with the decisions of other Circuit Courts of Appeals on the same matter, and on further ground that that Court has decided a federal question in a

way which is in conflict with applicable decisions of this Court.

2. Petitioners, together with others, were indicted in the United States District Court for the District of New Jersey on an indictment containing one count which charged a conspiracy between the defendants and officers of the German Consulate in the City of New York to the end that the various defendants would violate the Alien Registration Act of 1940 (Title 8 U. S. C. Sec. 452, *et seq.*) in that they would deny, falsify, and misrepresent that they, the defendants were not members of the Nazi Party, and in so doing would defraud and obstruct the United States in obtaining accurate information as to their membership and activities in the Nazi Party, its clubs, organizations, functions and activities in the United States in violation of Title 18 U. S. C. Sec. 88. The indictment charged that the alleged conspiracy was entered into about September 1st, 1939 and continued up to the date of the filing of the indictment at the April Term 1944. However, the last overt act alleged in the indictment was December 26th, 1940, which was the latest date that any defendant filed his Alien Registration statement.

3. The case came on for trial before the trial Court and a jury in Newark, New Jersey, on November 27th, 1944. Originally thirty-one defendants were indicted. Six entered pleas of guilty, there was a dismissal as to one, a severance as to fourteen and a trial as to ten. At the trial three were acquitted, there was a mistrial as to four and the three who are petitioners herein were convicted. Petitioners Fiswick and Rudolph were each sentenced to eighteen months, and petitioner Mayer was sentenced to a year and a day imprisonment.

4. An appeal from the judgment was taken to the United States Circuit Court of Appeals for the Third Circuit, which affirmed by a divided Court the judgment of the District Court on December 10th, 1945. A petition for rehearing was filed and was denied by the Circuit Court of Appeals for the Third Circuit on January 26th, 1946.

II.

Questions Presented.

The questions presented are:

1. May a conspiracy continue after the last overt act to effect its object has been committed?

2. Are statements made by defendants, not in the presence of each other and years after the commission of the last overt act charged in a conspiracy indictment, admissible to prove the existence of the conspiracy charged, and its continuance?

III.

Statement of the Case.

The names of the three petitioners who are German Nationals, together with others, appeared on a list of names which was found among the records of the German Consulate in New York City. The list was entitled "List of Persons who have Applied for Passports". A former employee of the Consulate named Lillian Illian testified that this list had been made up from file cards of persons who

were either prospective members or members of the Nazi Party. She did not however know any of the defendants personally. She further testified that a Dr. Draeger, who was a Consular officer instructed the members and prospective members not to disclose that they were members of the Nazi Party in the registration statements required to be filed under the Alien Registration Act of 1940 (Title 8 U. S. C. Sec. 452 *et seq.*). Subsequently, but before the last registration statements were filed in December 1940, the Consul sent out letters advising the various persons on the list who had been accepted as members that they should write to the Alien Registration Division of the Department of Justice to amend their registration statements to show that they were non-resident members of the National Socialist German Labor Party.

The Court also permitted to be introduced in evidence statements made by the petitioners, made in the case of petitioner Mayer on November 23rd, 1943, in the case of petitioner Fiswick on April 29th, 1944, May 19th, 1944 and May 26th, 1944, and in the case of petitioner Rudolph on November 17th, 1943 and September 5th, 1944, as well as statements made by other defendants during the same period, as against not only the individual defendant making the statement but also as against the other petitioners and defendants, on the theory that the conspiracy as alleged in the indictment continued down to the date of the filing of the indictment.

IV.

Statutes Involved.

Title 8 U. S. C. A. Section 452(a) (in effect June 28, 1940):

"It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 451 of this title, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

Title 8 U. S. C. A. Section 453(a):

"The application for the registration and fingerprinting, or for the registration of any alien who is in the United States on the effective date of such sections may be made at any time within four months after such date."

Title 8 U. S. C. A. Section 453(b):

"No foreign government official, or member of his family, shall be required to be registered or fingerprinted under this chapter."

Title 8 U. S. C. A. Section 455(a):

"The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this chapter. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional mat-

ters as may be prescribed by the Commissioner, with the approval of the Attorney General."

Title 8 U. S. C. A. Section 457(c):

"Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted within five years after entry into the United States shall, upon the warrant of the Attorney General, be taken into custody and be deported in the manner provided in sections 155 and 156 of this title."

Title 18 U. S. C. A. Section 88:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parites to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

V.

Reasons for Allowance of Writ.

The decision of the Circuit Court of Appeals as it appears in the majority opinion, conflicts with the decisions of this Court in *Brown* v. *Elliott*, 225 U. S. 392; *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *Irvine*, 98

U. S. 450 and other representative cases and authorities cited in the argument, which hold that there should be a distinction between the continuance of a crime and the continuance of the result thereof.

The minority opinion in the instant case, in the Circuit Court of Appeals, recognized this distinction while the majority opinion did not.

In a case involving a similar indictment but different defendants, tried in the Southern District of N. Y. which resulted in convictions, the convictions were set aside by the Circuit Court of Appeals for the Second Circuit for several reasons, among them being that the conspiracy charged in the indictment was a conspiracy *not* to defraud the United States but rather a conspiracy to have each defendant file false statements in violation of the Alien Registration Act. *United States* v. *Ausmeier*, 152 Fed. (2d) 349. A similar view was held by the minority opinion in the instant case while the majority opinion held otherwise.

WHEREFORE your petitioners pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals, in the said case entitled in that court: *United States of America* vs. *Ferdinand Fiswick, Jacob F. Mayer, and Fritz Gustav Rudolph*, No. 8864, October Term, 1944, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States and that

the judgment herein of the Circuit Court of Appeals be reversed by this Honorable Court, and for such other further relief as to this Court may seem proper.

FERDINAND FISWICK,
JACOB F. MAYER, and
FRITZ GUSTAV RUDOLPH,

By

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with
Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM 1945. No.

FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH,

Petitioners,
Appellants below,

vs.

UNITED STATES OF AMERICA,

Respondent,
Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The majority opinion of the Circuit Court of Appeals appears following page 351 of the Record and is followed immediately by the minority opinion.

II.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under Section 240(A) of the Judicial Code, as amended by Act of February 13th, 1925, c. 299, 43 Stat. 938 (28 U. S. C. 347).

(2) The judgment of the Circuit Court of Appeals was entered December 10th, 1945. A petition for rehearing was filed and was denied January 26th, 1946.

III.

Statement of the Case.

A full statement of the case is included in the preceding petition under Title III.

IV.

ARGUMENT.

The trial court erred in holding that the conspiracy charged in the indictment continued after the last overt act was committed where the purpose of the conspiracy was to commit the same.

The conspiracy charged was to defraud the United States Government by preventing it from obtaining certain information to which it was entitled, by the defendants filing false Alien Registration Statements in the fall of

1940 and failing to disclose the membership of the individual defendants in the Nazi Party. The government introduced statements made by the defendants, including petitioners years after the filing of the registration statements for the purpose of proving the existence of the conspiracy and the defendants' part therein. These statements were admitted by the Court not only against the individual defendants making the same but also against the co-defendants on the theory that the conspiracy was a continuing one even though no positive act was committed subsequent to the filing of the Statements in December, 1940. At page 205 of the Record, the trial court made the following statement:

> "The Court: Now in order that there may be no mistake, a question has arisen which I conceive to be novel, as to whether or not there is a continuing conspiracy without a positive act; I am ruling that the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there is such continuous cooperation. That has been the determination of the Supreme Court where there was an act of commission; I am now extending it to a situation whereby cooperation may be indicated by failure to do some act to indicate a desire to bring to an end the continuing situation effected by the act previously done. Under that ruling, and in order that there may be no further mistake, I shall rule that all statements which were made by each of the defendants, although they were made after 1940, will be admissible against each of the other alleged co-conspirators. * * *"

To this ruling an exception was taken and allowed (R. 206). This ruling was in effect approved by the majority opinion in the Circuit Court of Appeals for the Third Circuit. This ruling by the trial judge, as applied to the facts in this case, we feel is directly contrary to the decisions of this Court in *United States* v. *Irvine*, 98 U. S. 450, in *United States* v. *Kissel*, 218 U. S. 601, and in *Brown* v. *Elliott*, 225 U. S. 392.

The trial court in thus holding, attempted to make the conspiracy a continuing one, whereas only the result of the conspiracy, if any existed, continued. There was no proof of continued cooperation between the defendants after the filing of the registration statements, nor was there any affirmative act done by any of the defendants after those events, that is, subsequent to December, 1940, when the last registration statements were filed. Statements by members of a conspiracy can only be binding on co-conspirators when made during the existence of the conspiracy.

Clearly if the defendants had been charged with the substantive offense of violating the Alien Registration Act of 1940, under *United States* v. *Irvine, supra*, the act would have been complete with the filing of the false registration statement. If they had been counseled, aided and abetted in committing the substantive offense, their aiders and abettor would have been in the same position as they were and the statute of limitations would have started to run with the completion of the act of filing a false statement. Why then should an indictment for conspiracy with an allegation that the conspiracy continued down to the date of the filing of the indictment (R. 10), with no proof to support it, change the basic principle enunciated in the *Irvine* case. Both the trial court and the Circuit Court of Appeals in its majority

opinion confused the result of a crime with the continuing thereof. The conspiracy charged in the indictment had no continuity of purpose beyond the filing of the false registration statements and therefore was completed by the performance of those acts. There being a distinct period of accomplishment, upon this being completed, the conspiracy, if one existed, came to an end. *Hyde* v. *United States*, 225 U. S. 368; *United States* v. *Kissel, supra.*

If the conspiracy was a continuing one, as alleged in the indictment, it ended December, 1940, and therefore the statements of petitioners and other defendants, made three or four years later, concerning their own individual activities, not only were not proof of the existence of a conspiracy but were not binding upon their alleged co-conspirators. The admission of such statements in evidence was highly prejudicial to the rights of these petitioners.

Conclusion.

Your petitioners respectfully submit that the Circuit Court of Appeals for the Third Circuit has failed to follow the applicable decisions of this Court, and that a conflict exists between its decision and the decisions of other Circuit Courts of Appeals and of this Honorable Court, and that the questions presented by the foregoing petition should be reviewed by this Honorable Court.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel
with Petitioners.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 21 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 51.

FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH,

vs.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONERS.

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioners.
744 Broad Street,
Newark 2, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
SPECIFICATIONS OF ASSIGNED ERRORS AND QUESTIONS PRESENTED THEREBY	2
THE STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF PROCEEDINGS	4
THE INDICTMENT	6
STATEMENT OF FACTS	8
ARGUMENT	21
Point I. The Government failed to prove the charge of conspiracy, as set forth in the indictment	21
Point II. The Trial Court erred in its various rulings on the probative force and effect of statements made by and conversations held with defendants after the alleged conspiracy had ended, and the Circuit Court of Appeals likewise erred in sustaining the rulings of the Trial Court	26
Point III. There was no proof of intentional falsification in the registration statements filed by defendants	39
Point IV. The Trial Court erred in charging the jury on the admissibility and probative force of the written statements and verbal admissions of the defendants and the Circuit Court of Appeals erred in upholding this charge	43
Point V. The Trial Court erred in refusing to charge the jury as requested by the defendants and the Circuit Court of Appeals erred in upholding the Trial Court in this respect	49
CONCLUSION	51

Cases Cited.

	PAGE
Bridges case, 326 U. S. 135, 84 L. Ed. 2	41
Brown v. *Ellicott*, 225 U. S. 392, 56 L. Ed. 1136	28
Fowler v. *United States*, 273 Fed. 15	21
Pettibone v. *United States*, 148 U. S. 197, 34 L. Ed. 419	21
State v *Herbert*, 92 N. J. L. 341, 105 Atl. 796	34
United States v. *Ansmeir*, 152 Fed. (2d) 349	25
United States v. *Kissel*, 218 U. S. 601, 54 L. Ed. 1168	21, 28
United States v. *Marino*, 91 Fed. (2d) 691	21
United States v. *Reimer*, 79 Fed. (2d) 315	41
United States v. *Socony Vacuum Oil Company*, 310 U. S. 150, 84 L. Ed. 1129	28

Federal Statutes.

Judicial Code, Section 240 (A), as amended by Act of February 13, 1925, C. 299, 43 Stat. 938 (28 U. S. C. 347)	1
Title 8 U. S. C. A. Section 452(a)	3
Section 453(a)	3, 7
Section 453(b)	3, 7, 23
Section 455(a)	3
Section 457(c)	4, 28
Section 137(c)	41
Title 18 U. S. C. A. Section 88	4, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 51.

FERDINAND FISWICK, JACOB F. MAYER, and
FRITZ GUSTAV RUDOLPH;

vs.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONERS.

Opinion Below.

The opinion of the Circuit Court of Appeals of the Third Circuit, including the dissenting opinion (Record, p. 290) is reported in 153 Fed. 2d, 176.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 10, 1945. A petition for rehearing was filed and denied by the Circuit Court of Appeals for the Third Circuit on January 26, 1945. The petition for certiorari was filed March 4, 1946 and the writ granted April 22, 1946 (Record, p. 319). Petitioners invoked the jurisdiction of this Court under Section 240 (A) of the Judicial Code, as amended by the Act of February 13, 1925, c. 299, 43 Stat. 938 (28 U. S. C. 347).

Specification of Assigned Errors and Questions Presented Thereby.

1. Did the trial court err in holding that proof of the conspiracy charged in the indictment was sufficient *prima facie* to leave the issue to the jury and the Circuit Court of Appeals in sustaining the trial court in this determination.

This question is presented by the errors specified in assignment of errors numbers 2, 3 and 4 (Record, p. 284).

2. Did the trial court err in its various rulings on the probative force and effect of various statements by defendants (described as confessions and admissions) and the Circuit Court of Appeals in sustaining the rulings of the trial court.

This question is presented by the errors specified in assignment of errors numbers 8, 9, 10 and 11 (Record, p. 288).

3. Was there any proof of intentional falsification by defendants in registration statements filed by them as aliens under the Act of 1940.

This question is presented by the errors specified in assignment of errors numbers 3, 4 and 11 (Record, p. 284).

4. Did the trial court err in its charge to the jury and refusal to charge as requested by defendants and did the Circuit Court of Appeals err in sustaining the trial court.

This question is presented by the errors specified in assignment of errors numbers 5 and 6 (Record, pp. 284 and 285).

The Statutory Provisions Involved.

Title 8 U. S. C. A. Section 452 (a) (in effect June 28, 1940):

> "It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 451 of this title, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

Title 8 U. S. C. A. Section 453 (a):

> "The application for the registration and fingerprinting, or for the registration of any alien who is in the United States on the effective date of such section may be made at any time within four months after such date."

Title 8 U. S. C. A. Section 453 (b):

> "No foreign government official, or member of his family, shall be required to be registered or fingerprinted under this chapter."

Title 8 U. S. C. A. Section 455 (a):

> "The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this chapter. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General."

Title 8 U. S. C. A. Section 457 (c):

> "Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted within five years after entry into the United States shall, upon the warrant of the Attorney General, be taken into custody and be deported in the manner provided in sections 155 and 156 of this title."

Title 18 U. S. C. A. Section 88:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Statement of Proceedings.

The three defendants, Ferdinand Fiswick, Jacob F. Mayer and Fritz Gustav Rudolph, who appeal, are among 31 defendants who were indicted in the District of New Jersey and three named co-conspirators (not named as defendants) and others unnamed and also not indicted, in an indictment charging a conspiracy to defraud the United States with respect to certain registration statements filed

under the Alien Registration Act of 1940 hereinbefore set forth. The indictment was severed as to 14 of the defendants named therein, 5 retracted and entered pleas of guilty before the trial started, and the trial was moved on November 27, 1944 as to 12 of the defendants. During the trial, one of the defendants retracted his plea and entered a plea of guilty. At the conclusion of the case, the indictment was dismissed as to one of the defendants on trial. The case as to the remaining 10 defendants, including the 3 who appeal, was submitted to the jury. The jury disagreed as to 4, found a verdict of not guilty as to 3 others and convicted Fiswick, Mayer and Rudolph. Fiswick was sentenced to serve eighteen months, Mayer a year and a day, and Rudolph eighteen months. Fiswick, has served his sentence at the Federal Penitentiary at Danbury, Connecticut, and Mayer and Rudolph are released on bail. While Fiswick has served the sentence imposed if his conviction is sustained he is like Mayer and Rudolph still subject to deportation if this conviction is on grounds involving moral terpitude.

Before issue was joined, motions were made to quash the indictment and were denied. At the end of the government's case and at the end of the entire case motions were made for a directed verdict of not guilty and were denied.

Before the Court charged the jury various requests to charge were made by the defendants. Many of them were charged by the Court but some of them which related to the particular issues involved in the charge in the indictment and in the proofs were denied. Various exhibits were also admitted in evidence over timely objections to such admission.

The Indictment.

The indictment (Record, p. 7) charges that the defendants, between the first day of September 1939 and the day of the filing of the indictment at the April Term, 1944, of the United States District Court for the District of New Jersey, conspired with one Draeger, who was a consular officer of the German Reich in New York, Hans Vogel, his clerk or secretary, and one Fritz Zeglin, whose identity is not clear, and the German Ambassador to the United States and members of his staff, and other representatives of the Third German Reich, to defraud the United States of its governmental function in securing the full and complete listing of aliens residing in the United States together with certain information concerning them, particularly "membership in and affiliation with any clubs, societies, and organizations devoted to furthering the political activities, public relations and public policy" of a foreign government, and participation in the meetings and activities of such clubs, societies and organzations.

The indictment further charges that in the summer of 1941 and for five years prior thereto, Draeger was not only the German Consul in the City of New York, but also Kreisleiter or leader of the overseas portion of the Nazi Party in the United States, and that Vogel was his secretary and that in such capacity Vogel was engaged in matters concerning and affecting the operation and conduct of the Nazi Party and its members in activities in the United States (Record, p. 9).

The indictment then devotes several paragraphs to the alleged activities of the Nazi Party in the United States and its aims and purposes which generally were to pro-

mote loyalty and obedience to Adolph Hitler and the Nazi Party and the German Government.

The indictment then charges that it was part of the conspiracy that the defendants, being German nationals, immediately preceding the fall and winter of 1940 and well knowing the provisions of the Alien Registration Act of 1940 (Title 8 U. S. C. A. Section 453, *et seq.*) would in such registration "deny, falsify, conceal, misrepresent, mislead, disguise, deceive, fail to mention, equivocate and cover up by trick, scheme and device, material facts relating to the existence, kind and extent of each defendant's membership in, connection and affiliation with, their activities in and the activities of the said Nazi Party within the United States, during the five year period immediately preceding such registration" so that the officials of the United States would be defeated in their effort to obtain complete information required in the registration, the same being for the purpose of ascertaining the identity, location and activities of all aliens residing in the United States.

The indictment then goes on to charge that it was part of the conspiracy that the Consul, his secretary and the German Ambassador, etc. would advise, counsel, instruct, command and direct the defendants and that they would accept such advice and counsel and follow such instructions and commands to falsify, as above charged, in the registration certificates filed by each.

The indictment then charges that it was part of the conspiracy that they would continue to so deny and falsify after the Fall and early Winter of 1940 and that they, the defendants, would come before the Alien Registration officers and omit to disclose their membership and affiliation with the Nazi Party.

Then follow forty alleged overt acts. The defendant Mayer is mentioned in overt acts 17 and 18. The defendant Fiswick is mentioned in overt acts 25 and 26. The defendant Rudolph is mentioned in overt acts 32 and 33. The foregoing acts as to each of the defendants relate to a visit by each to the German Consul's office and the subsequent filing of the registration statement of each. The date of the last overt act alleged in the indictment was (overt acts 24 and 28) on or about December 26, 1940.

Statement of Facts.

For all practical purposes the Government relied upon the testimony of one Lilly Illian and certain papers which she identified, to support the charge of conspiracy set forth in the indictment.

Miss Illian was a clerk in the German Consulate in New York from March 1939 until May 1941 (Record, p. 17). She was in the department of the consulate headed by Dr. Draeger, who is named as a co-conspirator, and was actually in a Mr. Vogel's office, another co-conspirator, who was Draeger's secretary (Record, p. 18). One of her tasks was to receive dues from the members of the Nazi Party and to take care of correspondence that was dictated which pertained to the Party (Record, p. 18). Vogel did most of the dictating. Dr. Draeger seldom dictated. The witness did not know what the exact work of Dr. Draeger was but knew him as Consul and "Kreisleiter" (which she translated as district leader) of the National Socialist Party in New York. She collected dues and put them in a cash box and they were subsequently deposited in the bank in one of the accounts of the Consulate (Record, p. 22).

Anyone who paid dues was either given a stamp or a receipt and each member had neither a membership card or a book. Vogel took the applications for membership and they were sent to Germany with a report by Dr. Draeger (Record, p. 22). Each applicant had to have two sponsors in the United States and two sponsors in Germany (Record, p. 23). The witness testified (Record, p. 24) that when she started to work in the office there were file cards and files or folders. These cards contained the name of the person, the date of his birth, his occupation, his address and apparently a record of the payment of dues (Record, p. 24). She testified that the total amount of the initiation fees, etc. was $15.50 (Record, p. 24). Those who became members of the party had either cards or books which were sent from Germany (Record, p. 25). However, those who applied for membership also received a card (Exhibit G-2, Record, p. 26). And G-3 was sent to Germany with a report from Dr. Draeger (Record, p. 27). The witness testified that the applicants for membership also signed other papers such as G-4, G-5 and G-6 which stated whether or not applicant belonged to the Rotary Club or the German-American Bund, etc. When a German national applied for membership, he started paying dues but it took about two years to get the approval of his membership from Germany. If he was accepted as a member, he then received either a membership card or a book (G-10). (G-11 and G-12 are forms of receipts for dues) (Record, pp. 32, 33).

The Government produced an exhibit marked G-17 (Record, p. 36) which contained a list of names under the heading "List of Persons who have applied for Passports" (Record, p. 37). Miss Illian testified that she made part of this list up from the file cards hereinbefore referred to "of

members and prospective members" (Record, p. 37), and the rest of the list was made up by a Miss Koch, who worked in Mr. Vogel's office with her. She characterizes through her testimony persons who applied for membership in the party as "prospective members" (Record, p. 39). This list, she says, made up from the file cards, was a list of not only full members of the Party but also those who had applied for membership. According to her account the card index from which the list was made by her and Miss Koch disappeared from the office. She thinks it was destroyed by Mr. Vogel but she does not know positively. Anyway, it was in the early part of *1940* (Record, p. 40). While she does not know how the cards were destroyed, she testified that Vogel told her that the files in the office were burned (Record, p. 41), and her recollection is that the list (G-17) was made up in the early part of 1940.

She also used this list in sending out invitations or notices of various festivities in and about New York sponsored by the Consul's office, and numerous exhibits starting with G-18 showing the character of these notices or invitations were offered in evidence and had to do with dances, concerts, motion pictures, lectures and like entertainments which were open not only to the members of the Party but to the outside public (Record, p. 43). *She did not nor could not identify any of the defendants on trial as being the persons whose names were on the list.* In fact she did not know or identify any of the defendants on trial when she was called upon from time to time to identify them.

In August or September 1940, after the Registration Act was passed, Miss Illian testified that under the direction of Vogel she sent out form letters of which Exhibit G-36 is a sample (Record, p. 46) to the persons whose names were on

the list (G-17), and that some unidentified persons came in response to the letter (Record, p. 47), and that Dr. Draeger or Mr. Vogel instructed them. At this point in her testimony (Record, p. 48) the United States Attorney made a representation that he was going to prove that some of the defendants came, and after further argument the United States Attorney said this:

> "I don't know whether any of these defendants were there at this particular time but I will show a course of conduct by admissions made by those defendants themselves that they appeared at the Consulate office in response to letters received."

He did not undertake to prove that she either saw them when they came or heard what was said (Record, p. 48). She was then shown an exhibit which was marked G-37, which purports to contain the statement that the persons who called at the office in response to certain letters, were to make to items 10 and 15 on the Alien Registration Statement to be filed by all aliens (see Exhibit G-37) and that this had been prepared by Mr. Vogel, and that she was told by Mr. Vogel to give this to the people who called, and she *thinks* she did hand out some of the slips (Record, p. 50). Some people had registered before they received these instructions as to how to register and she made a list of them (Record, p. 50). The first instructions were not in writing but they were given by Dr. Draeger and the Court permitted her to testify, over objection, that Draeger "instructed the members and prospective members not to put the fact in that they were members of the National Socialist Party" in the Registration "Questionnaire" (Record, p. 51).

The second set of instructions (G-37) came after some had registered and were to be sent because "these people were to get a letter that was sent to the State Department and amending letter—I think they said something about it this morning." She then says in answer to a question:

> "The Court: They were to get a letter?
> The Witness: Yes.
> The Court: Which they in turn were to send to the State Department?
> The Witness: Yes.
> The Court: And the letter was to be sent out by whom, sent out from the Consulate?
> The Witness: Yes, it was given to the person I think.
> The Court: Given to them?
> The Witness: I would never send it out I know; it was somehow given to this person and he sent it out to the State Department."

The amendment to the Registration Statement was to the effect that they, the registrants "were non-resident members and so on" (Record, p. 53). She thinks she got the list of names of the persons to whom she was to send the second letter from Mr. Vogel. They were "told to me", and G-39 is the letter that she refers to, amending the original alien form (Record, p. 53). There was no proof whatsoever that any of these came into the hands of the defendants.

While on direct examination Miss Illian made use of the expression "prospective member", the "prospective" member was nothing more than an applicant for membership and did not become a member until final word came from Germany that he had been admitted to membership in the Party (Record, p. 63), although he did pay dues while

his application was pending (Record, p. 64). The card index that she spoke of which she said was destroyed, and from which she made out the list of names on G-17, contained not only the names of members but also those who had applied for membership. The Consul's office was closed in May 1941. On cross examination she only *thought* that she made up the list in 1940. She did not know the exact date. All she really knew was that Mr. Vogel told her that the file cards were going to be destroyed (Record, p. 41). G-36 was a copy of the letter that was sent out first from the office to the German nationals who were called upon to register (Record, p. 46).

On direct examination she was asked the question (Record, p. 47) "Miss Illian, do you know whether any of the members came to the German Consulate after that form letter which is Exhibit G-36 for Identification was sent out?" She said "Yes". And when asked if they came in response to that she said "Some of them, yes". However G-36 reads as follows (English translation): "I hereby request you to look me up at the Consulate General as soon as possible for the purpose of discussing a personal matter.

Heil Hitler
/s/ Dr. F. Draeger
Consul

Re. Summons re first reminder;

In arrears since July
$5 July 40
Dec. 40 inclus.
April 1941 incl."

This is but a sample of the kind of proof that was offered in this case by the Government.

On cross examination (Record, p. 69) Miss Illian said she kept no list of those whom, she said, came in response to the letter that was sent and no defendant was identified by her as being on this list. Only in one instance was she told what to say to people who came in but when asked whether she gave any of the people advice as to how to fill out the Alien Registration Statement, her only recollection was "I might have, yes". And when asked by the Court if she gave any of the people the form that had been made out by Vogel her answer was "Yes, I might have given it, yes." When pressed by the Court her answer was "I think I did". The form which was given out to some who came, according to her, is the form which appears on G-39, which reads as follows:

"United States Department of Justice
Immigration and Naturalization Service
Alien Registration Division
Washington, D. C.

Sirs:

Registration No.....

I have previously registered as an alien under the above number on the form provided for that purpose. I assumed from the wording of questions No. 10 and 15, that these questions referred to present activities.

However, in order to avoid any misunderstanding I wish to amend my registration so that the same shall show that I am a non-resident member of the National Socialistic German Labor Party since.... ....., but have not been actively engaged in any

way in said party, or on its behalf, and am not engaged in political activities in this country.

Respectfully submitted,"

As will be seen later, only one of the defendants wrote any such letter, or knew anything about it. And the only quarrel with the letter is that the government insisted but did not prove, that there is no such thing as a non-resident member.

Over objection of counsel, the Court permitted the introduction of statements made by the various defendants on trial to the F. B. I. which statements were secured in the years 1943 and 1944, and permitted their use as proof of the *corpus delicti* and the continuing character of the alleged conspiracy. This will be more fully discussed *infra*.

In addition to the written statement of the defendant Mayer, Mr. Bell of the F. B. I. was permitted to testify, over objection, to conversations which he had with Mayer about the time the statement was made. It appears from Mayer's statement (G-35 on Record, p. 272) that in 1936 or 1937 someone asked him if he would like to join the National Socialist German Labor Party and he was taken to New York to the German Consulate and there talked to someone and made application for membership and received a card. From time to time he went to the Consulate to pay dues, the last time being in December 1940. He also went to the Consulate in *September 1939* at the call of Dr. Draeger, the Consul, at which time twenty or twenty-five other persons were present and they were also told that they could become a citizen of the United States and remain in the Party. Some of those who were there, outside of Mayer, stated that they wanted to return to Germany.

In December 1940, Mayer went to the Consulate to pay his dues, at which time Vogel took the card away from him and wrote out *answers* to what are erroneously called *questions* on the Alien Registration statement (G-1G, Record, p. 267). As to number 10 he was to write "Reichsdeutsche vereinigung, New York, N. Y." As to number 15 he was to say "have not". He said he never heard of the above organization and was never a member of it. He says he was also told to leave out that he was a member of the National Socialist German Workers Party. There is no evidence that he ever did any more than make application to become a member. There is no proof that he visited the Consulate in the fall and winter of 1940 at anybody's suggestion or in response to any letter.

Statements of the defendant Rudolph were also admitted in evidence under like circumstances. One statement was made in November 1943 (G-67, Record, p. 279) and the other on September 5, 1944 (G-67, Record, p. 281). Appparently this defendant made application for membership in 1938 to join the National Socialist German Workers Party and received a book which he subsequently destroyed when he found that his mother and brother had died in Germany. While he says in the statement that he continued to pay dues up to a month or so before Pearl Harbor, there is obviously an error because the German Consulate was closed in May, 1941. In another paragraph in his statement, the following words are put in his mouth: "At the time of the first Alien registration in 1940, I was advised and consulted (*sic*) by the official at the German Consulate in New York, N. Y., to state on my registration form that I was not a member of this National Socialist

German Worker's Party. They stated that if anything happened to just deny membership in the party. They gave no further explanation that I recall." He does not recall the person who gave him the advice at the Consul's office.

However, on September 5, 1944 (Exhibit G-67-A, Record, p. 281) another statement is made by Rudolph after being interrogated by the F. B. I. In this second statement he states the following:

> "I first want it understood that I filled out both the 1940 and 1942 Alien Registration forms myself. I received no aid in executing them. Anything I may have previously stated in connection with having been advised and assisted in filling them out is not correct. I must have been excited at the time I told anything to the contrary."

He reiterated this later on by saying:

> "I wish to again state that I did this all of my own volition without anyone telling me how or why I should do so."

This, of course, refers to the statement made by him with respect to items 10 and 15 of the Registration Statement. The Registration Statement of 1942 being the Alien Enemy Registration Statement is not involved in these proceedings.

So far as the defendant Fiswick is concerned, his written statements were admitted in the same way (G-65, Record, p. 273). He states in detail, in his statement of April 29th, 1944, that he did make application for membership in the National Socialist German Worker's Party in July or August of 1939 in the presence of Vogel. From this state-

ment that he made in April 1944, it would seem that he went to the German Consulate to make an application to become a member of the Nazi Party because he had Nazi views, and for no other reason. However, in his subsequent letter in May 1944, the real reason appears why he made application for membership in the Nazi Party but never went through with it, and was not a Nazi at heart. Quite the opposite, as he is a devout Roman Catholic (Record, p. 279). He also stated in his first statement that he received some kind of a notice requesting him to appear at the German Consulate in 1940 and that he went there and discussed the Alien Registration statement with Vogel, who told not only Fiswick but also four other applicants for membership in the Party "that it would not be necessary for us to put down in the Alien Registration form of 1940 that we were members of the National Socialist German Workers Party since we had not as yet received our membership books from Germany." And so Fiswick says he did not put down in his Alien Registration form that he was either a member of or affiliated with the Party. Then follow words that were obviously put into his mouth: "I followed the instructions of Hans Vogel in filling out this alien registration of 1940." In his first statement he also speaks of attending a "meeting" of the Party at the German Consulate in April or May 1941. There is no proof in the case that any meetings of the Nazi Party of either a formal or informal nature were ever held at the Consulate. As Miss Illian says, from time to time letters were sent out requesting a few people named in the list to come to the Consulate on a personal matter, and the words used by Fiswick in his statement "In April or May 1941 I attended a meeting of the National Socialist German Workers Party"

were ill advised and Fiswick obviously did not mean what such words would imply. Also the words "I destroyed my prospective membership card * * *" after attending this final "meeting" of the National Socialist German Workers Party." To repeat, there is absolutely no proof outside of this statement of his made in April 1944 that he or any of the other defendants ever attended or that a meeting of the Party was ever held at the German Consulate. He was simply there with others and Draeger told them something and that is all there was to it.

Fiswick's real reason for application for membership in the Party appears in his letter of May 19, 1944, to the United States Attorney. He had some idea in 1939, on account of his wife's health, of returning to Germany permanently, and had an opportunity to purchase a business there and had corresponded with his brother, who was not a member of the Party and who, like Fiswick, when he lived in Germany, were members of the Catholic Center party until it was suppressed by Hitler. Before it became time to file his registration statement he had given up the idea and as he never had anything to do with the Party one way or the other and was not a member of it, he truthfully made the statements which he did make in his Registration Statement.

From none of these statements and the statements of other defendants that were admitted in evidence which were all of like import, or from the testimony of the F. B. I. agents who were permitted to testify as to conversations which they had with various defendants on trial when they interviewed them in 1943 and 1944, can it be said that there was proof that the conspiracy alleged in the indictment ex-

isted, and without these statements the government's case is even more barren of proof.

Fiswick and Rudolph in their Registration Statements, when called upon to declare under Item 10 "I am, or have been within the past 5 years, or intend to be engaged in the following activities: (In addition to other information, list memberships or activities in clubs, organizations, or societies)" stated "None". Mayer stated "Reichsdeutsche Vereingung New York, N. Y."

All three of them in Item 15 stated "Have not". Item 15 reads:

> "Within the past 5 years I.....been
> have, have not
> affiliated with or active in (a member of, official of, worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government * * *" (Exhibit G-1-F).

In some of the registration statements of the other defendants on trial they stated with respect to this Item 15 "I have not". Others stated simply "I have". Others stated "I am a non-resident member of the National Socialist German Labor Party". Another and the only one we could find, wrote the supplemental letter similar to G-39 *supra*, as to non-resident membership.

The Registration Statements were made by these various defendants at United States Post Offices and the blanks were filled in by clerks selected by the Government to assist registrants (Record, pp. 266, 268, 270).

Later we will discuss other parts of the evidence in connection with our argument and thus avoid repetition.

ARGUMENT.

POINT I.

The Government failed to prove the charge of conspiracy, as set forth in the indictment.

(Assignment of Errors, 2 3 and 4.)

There is an utter failure of proof of any conspiracy. As has often been said, "A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose". *Pettibone* v. *United States*, 148 U. S. 197, 34 L. Ed. 419; *United States* v. *Marino*, 91 Fed. (2d) 691, and cases cited. "It is a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds," and while a conspiracy is constituted by an agreement it is however the result of the agreement and not the agreement itself. *United States* v. *Kissel, supra*, 218 U. S. 601 at 608, 54 Law Ed. 1168; *United States* v. *Marino, supra*. There must be a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a *common* purpose. *Fowler* v. *United States*, 273 Fed. 15 at page 19. The accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joins in the agreement. *United States* v. *Marino, supra*, at page 695 and cases cited. These are all well known rules and hardly need recitation.

We repeat that the proofs in this case fail to establish the elements necessary to constitute a conspiracy under the provisions of Title 18 U. S. C. A., Sec. 88. While it may

be *alleged* and *said* that those named in the indictment as defendants and co-conspirators had a concert of purpose, that is to defraud the United States by each defendant filing a false statement, there is no proof of any concert of purpose between Draeger and Vogel on the one hand and the defendants on the other, nor was there proof of the existence of any agreement between Draeger and Vogel and one in which the defendants joined.

From the testimony of Miss Illian it appears as we have heretofore shown that the relation of master and servant existed between Draeger and Vogel and Vogel simply carried out instructions given to him by Draeger. The same with Miss Illian, who is not even named as a co-conspirator, nor is Miss Koch, the other clerk in the office. There was no proof outside of statements made by some of the defendants who were on trial to the F.B.I. in 1943 or 1944, that they visited the German Consulate in New York in response to a written request to call there. Those who called voluntarily, obviously called for the purpose of getting information as to how the Registration Statement should be filled out. Use the verbs "directed", "instructed", or "suggested", if you please. These words do not import or establish by circumstantial evidence an agreement between those who came there and Draeger and Vogel or either of them. Assume that each defendant when he filed his Registration Statement intended to withhold from the Government of the United States the fact that he had ever been a member of, an applicant for membership in or affiliated with the Nazi Party, and that each one of them had such purpose in mind. It is not a conspiracy. Just what purpose Draeger the German Vice Consul may

have had in mind when he gave the instructions to Vogel (if he ever gave them) or what Vogel may have had in mind when he either instructed or advised those who came to the office, no one knows and there is no proof. And certainly if there was no unlawful agreement between Draeger and Vogel then none of the defendants took part in any conspiracy. Of course it is true that a conspiracy can be proven by circumstantial evidence, but such evidence is utterly lacking in this case. We contend further that as Draeger and Vogel, or Draeger at least, were consular agents and not called upon to register, that they could not enter into the agreement with the other defendants that all of them should register falsely. (See Statute on exemption of government agents *infra* Title 8 U. S. C. A. Sec. 453 (b).). The necessary concert of purpose is lacking here the same as it is lacking between one who sells a commodity and one who purchases that commodity from him.

Neither is following instructions or advice to do a certain act proof of an agreement to do it any more than a child obeying its parents or a patient taking the advice of a physician.

If there had been proof that all the defendants or some of them came to the Consulate seeking advice as to how to *conceal* the fact in their Registration Statements that they were members of the Nazi Party then we might be confronted with a different proposition. *But that is not the proof.* There is no proof that they went there with any such purpose in mind.

It will be recalled that Miss Illian testified that Draeger had directed that a letter be sent out to prospective registrants requesting them to call at the Consulate (Record,

p. 45). This was about the time the Registration Act went into effect. Some people came in and received instructions, people who were not identified. Later on those who had registered were sent for again and told to correct the statement made in item 15 so that it would read that he was a non-resident member of the Nazi Party.

We have not printed in the record the statements of the other defendants on trial that were admitted in evidence over our objection as they were all to the same general effect as the statements of the defendants whose appeal is now being considered (Record, pp. 272-282).

The only other witness, in addition to Miss Illian who testified with respect to "instructions", was the defendant Borchers, who was called to testify by the Government (Record, pp. 87-102). The only thing of importance that he said was that in the early part of September 1940 he was called to the German Consul's office and saw Vogel and Draeger and he was told that he would soon have to register and that was *all* he was told. He said that later on he went to the Consul's office but had no talk about registering. He was then asked the question, referring back to the incident in September, 1940 (Record, p. 93):

> "Q. What did he (Vogel) say in connection with registering about your Party membership? • • •
>
> The Interpreter: He said that when they went to register they were not to state that they were organized.
>
> Q. Organized as to what? A. The Nazi Party."

We submit that even taking the testimony of Miss Illian and Mr. Borchers at its face value together with the state-

ments made by the defendants there is an utter failure of proof of the conspiracy charged, or is there any proof of intentional falsification by the individual defendants in the Registration Statements filed by them, and that the motions to direct a verdict of not guilty should for these reasons have been granted.

As we read the majority opinion of the Circuit Court of Appeals (Record, p. 290) the Court reached the conclusion that the trial court committed no error in denying the motion to direct a verdict of acquittal and in leaving it to the jury to determine the existence or non existence of a conspiracy as charged in the indictment. In this we urge that not only did the trial court err but also the Circuit Court of Appeals in sustaining this ruling.

We also, under this Point, desire to urge that while the trial court and the majority of the Circuit Court of Appeals concluded that there was proof that the defendants conspired *to defraud the United States*, that the indictment really went no further than to charge that the defendants conspired to violate the Alien Registration Act by filing false statements. The minority opinion upholds this contention (Record, p. 365) and this view is further sustained by an opinion of the Circuit Court of Appeals of the 2nd Circuit where an indictment in similar language to the indictment in these proceedings was held to charge a conspiracy to commit the substantive offense of violating the Alien Registration Act and not of conspiring to defraud the United States (*U. S.* vs. *Ansmeir*, 152 Fed. 2d, 349).

POINT II.

The Trial Court erred in its various rulings on the probative force and effect of statements made by and conversations held with defendants after the alleged conspiracy had ended, and the Circuit Court of Appeals likewise erred in sustaining the rulings of the Trial Court.

(Assignment of Errors 8, 9, 10, 11.)

It is our contention that the trial court erred in permitting to stand, the testimony of agents of the Federal Bureau of Investigation concerning conversations with and the written statements made by some of the defendants years after the alleged conspiracy must have ended. It is also our contention that such statements were never admissible for the purpose of proving the *corpus delicti, i. e.* the alleged unlawful agreement, nor of the continuance of the alleged conspiracy.

The indictment charges (Record, p. 8) that the defendants and co-conspirators conspired to defraud the government of its governmental function in securing the full and complete listing and fingerprinting of all aliens residing and being within the United States together with their names and places of residence, nationality, date of entry into the United States, activities therein, criminal records and membership in and affiliation with any clubs, societies and organizations devoted to furthering the political activities, etc. of foreign governments by filing false Registration Statements. The basis of the authority of the United

States to have such information is found in the statutes hereinbefore set forth in "Statutes Involved". These statutes make it the duty of every alien to register before the end of the year 1940 and the registration is to be made on the forms prepared for the purpose. A sample of this form is Exhibit G-1-F (Record, p. 265). Punishment is prescribed for false statements in such registration. While the indictment, charging a conspiracy to defraud the United States in this respect, goes on to state that it was part and parcel of the conspiracy that each one of the defendants should file such false registration statement it is not alleged that in defrauding the United States anything else was to be done. So here we have a conspiracy charged, to defraud the Government by cert n aliens filing false registration statements, all of which statements were filed not later than December 1940. The last overt act alleged, took place in December 1940 and was the filing of a Registration Statement by one of the defendants. The Court admitted the testimony of the agents of the Federal Bureau of Investigation (Record, p. 106, *et seq.*) with respect to conversations with some of the defendants in the latter part of 1943 and in 1944, on the theory that evidence had to come in piecemeal (Record, p. 107) and on the theory that it was admissible because the indictment charged that the conspiracy alleged, continued down to the date of the filing of the indictment.

We submit that if it is contended that a conspiracy existed and was proven that it ended when the last Registration Statement was filed in December 1940. To hold otherwise would be to confuse the continuance of the result with the continuance of the crime. To keep a conspiracy alive

and continuing there must be proof of the continuous cooperation of the conspirators to keep it alive. *United States* v. *Kissel*, 218 U. S. 601 at 608, 54 L. Ed. 1169 at 1178; *United States* v. *Socony Vacuum Oil Company*, 310 U. S. 150 at 253, 84 L. Ed. 1129 at 1184; *Brown* v. *Ellicott*, 225 U. S. 392 at 400, 56 L. Ed. 1136 at 1140.

To hold that the conspiracy alleged continued down to the day of the filing of the indictment would be to uphold a theory that as long as the consequences or the effect of previous acts continued to endure by the same token the conspiracy itself continued. To hold that the conspiracy continued if any existed, after the filing of the last Registration Statements would be to hold that it continued to exist until the alleged false statements in the Registration Statements were corrected. To so hold would mean that an indictment might be found at any time after the Registration Statements were filed and until the falsity was discovered or disclosed, no matter how many years later that might be. Even then six more years could elapse before the statute barred prosecution, if such a theory is tenable.

Incidentally, it is perfectly obvious why these defendants were charged with conspiring to defraud the Government. The indictment was not found until the April Term, 1944 and at that time the statute of limitations had barred prosecution for the commission of the substantive offense, (Title 8 U. S. C. A. 457), as the three year limitation applies to that statute.

The trial judge admitted in evidence the statements of all the defendants against each other after the motion had been made to direct a verdict of not guilty at the end of the Government's case. The Court made the following statement (Record, p. 165):

"The Court: Now in order that there may be no mistake, a question has arisen which I conceive to be novel, as to whether or not there is a continuing conspiracy without a positive act; I am ruling that the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there (p. 432) is such continuous cooperation. That has been the determination of the Supreme Court where there was an act of commission; I am now extending it to a situation whereby cooperation may be indicated by failure to do some act to indicate a desire to bring to an end the continuing situation effected by the act previously done. Under that ruling, and in order that there may be no further mistake, I shall rule that all statements which were made by each of the defendants, although they were made after 1940, will be admissible against each of the other alleged co-conspirators.

Now, that puts me in right up to my eyebrows, I cannot get out of it, if I am wrong and I want the question determined.

Mr. Pearse: Judge, you mean it puts us right up to our eyebrows.

The Court: No, it puts me in; I mean there is no mistake about what I am trying to say, is there, Mr. Pearse?

Mr. Pearse: Not the slightest. Your Honor will allow us all an exception?"

A discussion of the principles of law with respect to the admission of statements of co-defendants first arose at the trial when the Government called Mr. Bell of the Federal Bureau of Investigation to testify with respect to conver-

sations that he had had with the defendant Mayer in November 1943, ~~two~~ three years after the time for filing the Alien Registration Statement required under the Act of 1940. This was prior to the ruling by the Court which was just quoted.

Counsel objected (Record, p. 106) on behalf of the defendants other than Mayer, to such testimony, not only on the ground that it was not binding on the other defendants but that it was not binding *then* even upon Mayer, for the reason that there had not yet been introduced sufficient proof of the existence of any conspiracy. The Court however, let the testimony in at that time with the reservation of the right to strike it out and not passing definitely at that time on the proofs so far as the conspiracy was concerned, making the following comment (Record, p. 107):

> "The Court: But the proof is not all in yet, and there is no proof that the conspiracy was even entered into.
>
> Mr. Pearse: And if the Court please——
>
> The Court: Or there may not be—I am not passing on that definitely, but there may not be; * * *."

And the Court made a further comment (Record, p. 108) with respect to the proof of the existence of a conspiracy when it was called to the court's attention that the last overt act pleaded, was in December, 1940:

> "The Court: December of 1940, but that as I conceive it, does not prevent the Government from showing that there were other overt acts not recited or set forth in the indictment."

The Court then instructed the jury (Record, p. 110) as follows and before making the ruling first quoted in this Point:

> "The Court: I will say, ladies and gentlemen of the jury, that I have no means of knowing what this testimony will be, nor have you; but if it be in the nature of an admission on the part of the person with whom this witness is alleged to have spoken, it will be admissible at this time only as against this defendant who is supposed to have had the conversation; and if the conversation took place after the expiration of the conspiracy, it will be admissible against him and can under no circumstances be used against the balance of the alleged conspirators. All right, proceed."

Further objection was then made to the introduction of this testimony not only as against the others but also as against Mayer on the ground that the testimony was taken after Mayer was in custody and could not under any circumstances be used to prove the *corpus delicti* (Record, p. 111). Argument proceeded on that motion and thereupon the Court apparently decided to hold that there was already sufficient evidence from which the jury could find that a conspiracy existed (Record, p. 112), that is that the *corpus delicti* had been sufficiently proven. However, the Court did not then pass upon the proposition as to whether or not there was any evidence of the actual participation of any particular defendant in the conspiracy. Later on the question arose and it resulted in admitting in evidence the written statement of the defendant Mayer (G-56, Record, p. 146). Subsequently the testimony of other representatives of the F. B. I. was admitted with respect to some of the

other defendants as well as the written statements of all who were on trial and thereafter the motion was made that is referred to at the beginning of this point and was finally decided against the defendants in the language of the Court first above set forth.

No one can quarrel with a ruling that after a conspiracy has been proven *prima facie*, or rather after the introduction of proof of an alleged conspiracy of sufficient weight for the Court to determine that it had become a question of fact for the jury to decide whether or not a conspiracy existed as charged in the indictment, that the statements of individual defendants, after the termination of the conspiracy, may be used against the particular defendant who made the statement, with the qualifying instruction to the jury that under no circumstances can such a statement ever be used against co-defendants. However, in this case, the Court went much further and held that there was proof that a conspiracy existed and continued down to the time of the filing of the indictment and that statements taken just before or after the defendants were in custody and could not possibly commit any overt acts in furtherance of the conspiracy, whether in custody or not, were binding not only upon them but also upon all the other defendants and could be considered by the jury, taking all the statements together, not only as proof of the existence of but as the proof of the continuation of the conspiracy down to the day of the filing of the indictment.

We submit that there are no authorities to support any such ruling.

In the first place, from a reading of the statements, not only of the defendants who appeal, but also of the rest of

the defendants who were on trial, we challenge the Government as a matter of fact to point out where any of them furnish justifiable proof of the existence of a conspiracy, taking them singly or as a whole.

Again, it is only because the Court held that the conspiracy was a continuing one after December, 1940 that make such statements admissible even against the defendant or defendants who made them in the absence of other proof of the conspiracy charged. Certainly, the statements themselves are not overt acts, nor are there any admissions in them of overt acts by the defendants making them, after December, 1940.

Again, statements taken under the circumstances in which these statements were taken may not be used for the purpose of proving the *corpus delicti*. But if they are admitted in evidence they are highly prejudicial to the rights of the defendants who did not make them and who can not be bound by them. Furthermore, under the ruling made by the Court, who can say that the jury did not consider them in its search for proof of the existence of the conspiracy charged.

And again, we submit that the Trial Court in making its ruling has, as we have previously stated, confused the continuation of the results of the alleged unlawful agreement with the continuation of the alleged unlawful agreement itself.

In a charge of conspiracy to defraud the United States, it must be to defraud by doing something, either to deprive the United States of money or something of value, or by some definite step to interfere with governmental func-

tions. Here the charge was to conspire to defraud by filing false Registration Statements. After these were filed the object was accomplished. Not attempting to correct the alleged falsity is not a continuance of the unlawful agreement. Some act must be done to keep it alive. Such act was never proven. As further proof that the charge was limited to the functions of government established by the Registration Act of 1940, is the fact that under the Presidential Proclamation of *1942* all nationals of countries with which the United States was at war were required once more to Register and to file statements similar to those filed by *all* aliens in 1940 and there is no allegation in the indictment relating to this subsequent duty of the defendants or a charge of falsifying their status in the 1942 Registration Statements or proof that they did.

One of the best opinions on the subject of a continuing conspiracy is to be found in the case of *State v. Herbert,* 92 N. J. L 341, 105 Atl. 796. The opinion is by Justice Kalisch now deceased, but in his lifetime a very learned member of the New Jersey Supreme Court. The case, which was up for review, was based upon a charge of conspiracy to obstruct justice in a divorce suit, that is, to obtain a divorce on false testimony. One of the questions arose as to when the conspiracy ended and it arose over the admissibility of statements of alleged co-conspirators in the absence of each other after the false testimony had been given in the divorce suit, the case having been appealed from the Court of Chancery to the Court of Errors and Appeals, where it was pending, and during which period the statements admitted in evidence were made. After a careful review of the law as pronounced in the

Kissel case, *supra,* and in other United States Supreme Court cases, as well as in English cases, the Court reached the conclusion which it expressed as follows:

> "It would seem, therefore, in the present case that when the false evidence was produced and offered, in the Court of Chancery, the crime charged was complete, irrespective of the fact whether the divorce was granted or not. It is not to be overlooked that it is the nature of the agreement, not the act of the parties that determines whether the conspiracy is a continuing one.
>
> The averments in the indictment that the agreement was to pervert and obstruct the due administration of the laws of this State and to obstruct justice, do not have the legal effect of making the agreement a continuous one, for they are limited in their effect, by the language in the indictment, to the obtaining of the divorce by false evidence, and to falsely move and maintain the suit in the Court of Chancery. Instances of continuous conspiracies are those in restraint of trade, to extort money, and to divide the proceeds, and such acts which in their very nature carry with them *continuity of action.* (Italics ours.)
>
> The present case strikingly illustrates a condition that the United States Supreme Court warns against; that is, the likelihood of unconsciously converting the result of a conspiracy into a continuing one, as here, namely, the production of false evidence in the divorce case and the use subsequently made of such evidence by Mrs. Knittel and Garrison, on the appeal to the Court of last resort."

We submit that this is the very error into which the trial court in this case fell when permitting the admission in evidence of the statements of the various defendants made in 1943 and 1944 and ruling that they might be used

by the jury against all of the defendants. Admissions, if any, in these statements could never be used to prove the conspiracy or as proof of overt acts in its furtherance or continuance.

The Circuit Court of Appeals as appears in the majority opinion disagreed with our contentions on this point (Record, p. 361) while the dissenting opinion, in the main, sustained them (Record, p. 366).

The Circuit Court of Appeals held "that the scheme did not end with false registration. The latter was essential but to accomplish the end result the concealment of Nazi membership had to be affirmatively maintained thereafter." There is nothing in the evidence to prove that the scheme, if there was any, did not end in December 1940 when the last registration statement was filed as appears not only in the indictment but also in the proof. In each one of the statements of defendants offered in evidence not only the three that appeal, but also the others (All made in 1943 or 1944) they said nothing that would be evidential that they (in 1943 and 194 were continuing to carry on an alleged conspiracy that began in 1939 as alleged in the indictment. The majority opinion in the Circuit Court of Appeals makes this statement (Record, p. 363):

> "It is the nature of the agreement rather than the acts of the parties that determines if the conspiracy is a continuing one. The instant indictment charges a continuing agreement between the conspirators from prior to 1940 down to the date of the indictment. That was the foundation of the indictment and of the Government's evidence. It was on that theory that the statements by and conversations with the defendants was allowed."

We urge that the Circuit Court of Appeals in the majority opinion is confusing charges with proof and that there is no proof that (assuming a conspiracy to have been proven) any of the defendants on trial did any overt act to carry on such conspiracy as charged after the filing of the last registration statement in December, 1940.

The Circuit Court of Appeals in the majority opinion makes a point of confessions in this language (Record, p. 363):

> "It is not difficult to accept the so-called confessions as part of the acts which furthered the conspiracy when it is remembered that as to Mayer and Fiswick, their confessions coupled with the immediately preceding denials and as to Rudolph, his trial repudiation of his confession all give some indication at least that there has been a continuing affirmative fraud on the United States.
>
> If we are correct that the conversations with and the statements by the defendants, including Rudolph's testimony, are evidence of the continued functioning of the plan of not disclosing information and of giving false information, then there is no difficulty with respect to the statute of limitations. The jury by its verdict obviously believed as they were entitled to that they were dealing with a crime which continued right into the trial itself and therefore cases such as United States *v.* Irvine, 98 U. S. 450, 25 L. Ed. 193 and Meyer *v.* United States, 9 Cir. 220 F. 800 do not apply. Compare United States *v.* Alfano, 3 Cir., 152 F. 2d 395."

The statements made by defendants were not confessions of guilt. They were simply to the effect that whatever they had said on their respective registration statements

were true and by their latter statements they were attempting to explain that what they had said in the first instance was true although they may have not sufficiently understood such definitions as "affiliated with or active in (a member of, official of, or working for) organizations devoted in whole or in part to influence or furthering the political activities, public relations or public policy of a foreign government." None of the three who appeal were ever members of the so-called Nazi Party. The extent of their activities was application for membership (Record, pp. 272-282). Nothing in their statements to the F. B. I. was false information nor was the statement in the majority opinion of the Circuit Court of Appeals supported by any evidence that these statements were proof of "a continuing functioning of the plan of not disclosing information and of giving false information."

The dissenting opinion sums up in these words (Record, p. 365):

> "These confessions were each permitted to go in, over appropriate objection, as evidence against all of the Appellants, notwithstanding the fact that the statements could in no wise have been in furtherance of a conspiracy in that they were each made to the F. B. I. in full revelation, termination, and frustration of a conspiracy whose chief object had been the concealment of the same facts as revealed by the confessions."

This statement we urge is fully supported by the facts proven at the trial and that it was error to admit such statements either as proof of the conspiracy charged in the indictment or the continuance thereof.

POINT III.

There was no proof of intentional falsification in the registration statements filed by defendants.

(Assignments of Error 2 3, 4 and 11.)

Before aliens registered under the Alien Registration Act of 1940 they were furnished with instructions for registration and a specimen form of the Registration Statement (Exhibit D-2) which is not printed in this record. The instructions with respect to item 10, "Activities" are explained in these words:

> "State your activities during the past 5 years, either in the United States or abroad, other than as shown by your statements regarding present or usual occupation * * *."

Instructions under item 15 are entitled "*Activities for foreign government*". The prospective registrant is told to "write 'have' or 'have not' according to the fact." He is then told "If you write 'have,' state *position held*, length of time, nature of duties or activities, compensation received, and names of any *such* clubs, organizations, or societies." He is then told, if he has been employed by any foreign government he is to set forth the nature of the employment under this same item.

Turning to item 15 in the Registration Statement itself, G-1-F (Record, p. 266) the words are these:

> "Within the past 5 years I (have or have not) been *affiliated* with or *active in* (a member of, official

of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government."

In the instructions concerning item 15 nothing is said about "affiliation" and one would naturally assume that unless one held some position in such organization and therefore active in the organization, that the proper statement would be "I have not". Certainly this would be so understood by one who had only applied for membership in an organization. In item 15 itself, nothing is required to be declared concerning application for membership in any organization unless the word "affiliated" would put one who had applied for membership in the category of being affiliated with an organization. Affiliated, to be sure, is a broad term and its meaning in the registration statement is not defined in the instructions as to how to fill out item 15. It should be borne in mind that all of the defendants were humble folk, some of them spoke English well, others did not. We submit that even a person educated in this country might have difficulty in understanding just what was meant by being "affiliated" after reading the instructions on item 15 concerning "Activities for foreign government." Looking at the ordinary English dictionary we find that to affiliate with is "to receive on friendly terms; associate; to be intimate; sympathize; consort".

From our reading, the word "affiliation" seems to be susceptible of various meanings depending upon the subject matter to which it is applied. For example, another statute respecting Aliens and Nationality, in its provisions, sets up classes that shall be excluded from admission into

the United States and excludes "aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence the Government of the United States * * *". This provision is to be found in Title 8 U. S. C. Section 137 (c). The same section in paragraph (f) defines "affiliation" as follows:

> "For the purpose of this section: * * *; (2) the giving, loaning, or promising of money or anything of value to any organization, association, society, or group of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of * * * affiliation."

As we have already stated, "affiliation" is not defined in the instructions to registrants under the 1940 Act and they have to determine for themselves what it means.

In the *Bridges* case recently decided by this Court, (326 U. S. 135, 84 L. Ed. 2, 103), the Court had occasion to define what "affiliation" meant under the Act above quoted. The Court first gives the construction placed upon the Act in the case of *United States* v. *Reimer*, 79 Fed. (2d) 315 at 317, where Judge Chase, in the Second Circuit, said in part:

> "In deciding this case, we shall not attempt to give a comprehensive definition of the word 'affiliation' as used in the statute. Very likely that is as impossible as it is now unnecessary."

The Court in the *Bridges* case takes up several paragraphs in defining the meaning of the word and says in part:

> "Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objects of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition"

The Court quotes from Judge Sears who wrote the opinion in the deportation proceedings of Bridges, and he also attempted to define "affiliation." The Supreme Court quotes his words as follows:

> "Affiliation may doubtless be shown circumstantially. Assistance in the enterprises of an organization, seeking members for it, taking part in meetings organized and directed by or on behalf of the organization, would all tend to show affiliation."

And so we say that in view of the instructions concerning "Activities for Foreign Government" under item 15, which say nothing about affiliation, and then finding the words "affiliated with" in item 15 itself followed by the words in parenthesis "(a member of, official of, and a worker for)", how can it be said that these defendants who had only *applied* for membership in the Nazi Party, who had taken part in no actual activities and who had not been accepted as members when they filled in the words "have not", did so with an evil purpose in mind to deceive the Government of the United States, or did so as part of a joint undertaking between them and other registrants and in a criminal conspiracy to deprive the Government of the United States of information which it should have.

Furthermore, there is no proof of anything sinister in the minds of the defendants when they went to the office of the German Consul seeking information as to the proper way to fill out their respective Registration Statements. It was a new law and no matter how long they had been in this country they were still German nationals and nothing of this nature had been required by the Government of the United States since the last World War. They were in a way, strangers in a strange land. It was therefore perfectly natural that they should seek information from the Consulate, not to learn some clever way of hiding something but to learn what the involved phraseology meant and just what should be included and in what language, or what language or words should be used to truthfully apprize the Government of the United States of their respective associations and activities. There was no proof of any conversation between the people at the Consulate and any of the defendants other than what is contained in the written statements, of the defendants, and from a reading of those statements it is perfectly obvious that if anyone in the Consulate had any sinister motives, they fell upon deaf ears so far as any of the defendants is concerned.

POINT IV.

The Trial Court erred in charging the jury on the admissibility and probative force of the written statements and verbal admissions of the defendants and the Circuit Court of Appeals erred in upholding this charge.

(Assignment of Error 5.)

After charging the jury with respect to the usual matters such as "presumption of innocence" and "reasonable

doubt", the Trial Court stated the following (Record, p. 239):

> "There have been admitted into evidence certain statements, written statements *and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy;* and these admissions and statements are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it. I have ruled that this is a continuing conspiracy, and with the exception of one defendant, to whom I shall advert later, I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of proving the conspiracy itself, but simply to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the conspiracy."

The foregoing, it will be observed, is an instruction to the jury as to what effect the statements or admissions of the defendants may have upon the minds of the jury in its deliberations and in determining whether or not there was a conspiracy, whether or not it was a continuing one and whether or not any of the defendants had any part in it.

While the Circuit Court of Appeals in the majority opinion makes the statement that no exception was taken to this part of the charge to the jury by the trial court (Record, p. 360) the Court quotes from the exception which was taken and we urge that it was sufficient.

The language of the charge as herein quoted makes the bold statement to the jury of "verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy; and these admissions and statements are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it." That and all the rest of what the Court said about the statements admitted in evidence was fully covered we urge, by our exception.

Yet, the Circuit Court of Appeals in the majority opinion, in sustaining this charge, seems to be of the opinion that it was adequately explained by the trial court after the jury had returned for further instructions. We urge that the jury did not understand the original charge and that the additional instructions to the jury not only did not clarify but fell into the original error of admitting the statements of all the defendants on trial as binding on each one. This certainly is contrary to all of the decisions of this Court and of the Circuit Courts of Appeal in all circuits.

The minority opinion of Judge Waller fully demonstrates and supports our contention and we quote from that opinion as follows (Record, p. 368):

> "The foregoing charge to the jury had these serious vices:
>
> (a) It advised the jury that the verbal admissions *were made by conspirators.*
>
> (b) It advised the jury that the activities of the makers of the admissions *were done in furtherance of the objects of the conspiracy.*

(c) It advised the jury *that there was a conspiracy.* Otherwise nothing could have been done in furtherance thereof.

(d) It advised the jury that *the Court had ruled* that *it was a continuing conspiracy,* with the exception of one Defendant.

(e) It advised the jury that the admissions of any Defendant was evidence against all others.

(f) It advised the jury that the statements were admitted to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to *the other co-conspirators.*

(g) It advised the jury that the conspiracy continued to the date of the indictment.

A judge cannot say to the jury that a defendant is a 'conspirator' or a 'co-conspirator' without telling the jury that 'there was a conspiracy'. The judge cannot tell the jury that this is a 'continuing conspiracy' without telling the jury that 'this is a conspiracy'. The judge cannot tell the jury that 'activities were done by conspirators in furtherance of the object of a conspiracy' without telling the jury that 'there was a conspiracy'.

Moreover, as we have demonstrated heretofore there is not the slightest evidence in this case, other than the silence of the Appellants prior to their confessions to the F. B. I. of the continuance of the conspiracy. Neither a conspiracy nor its continuance can be proven by the mere failure of a defendant to make a report to the officers.

This charge to the jury was the equivalent of a peremptory instruction to convict the Defendants."

"A statement made by a member of an existing conspiracy, out of the presence of another conspirator, cannot be used against the other conspirator, unless such statement is made in furtherance of the

objects of the conspiracy, or in and about the business of the criminal partnership. I reiterate, a statement made in giving the facts to the F. B. I. cannot possibly be held to be in furtherance of a conspiracy which conspiracy has for its chief object the suppression of those same facts.

Nevertheless, the lower Court advised the jury: 'There have been admitted into evidence * * * written statements and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy' and that they were, therefore, admissible against all Defendants if made during the continuance of the conspiracy and during their participation in it. He then peremptorily told the jury: 'I have ruled that this is a continuing conspiracy', thus telling the jury that there had been a conspiracy and that the statements by the Appellants were made during its continuance.

The Court below, in declaring that the conspiracy had continued until the bringing of the indictment, evidently overlooked the fact that such a holding required it to assume the prior existence of the alleged conspiracy.

The following statements seem so axiomatic as not to require citation of authorities in support:

(1) The existence, *vel non*, of a conspiracy is for a jury.

(2) Whether a conspiracy has continued is a question for the jury.

(3) Whether any act committed by a defendant was in furtherance of the object of the conspiracy is for the jury.

(4) No act of an alleged conspirator may be shown except one that the jury would have the right to conclude was in furtherance of the conspiracy.

(5) No statement made by one alleged conspirator is admissible against one who was not present when the statement was made unless there was evidence tending to show that the absentee was a member of the conspiracy and that the statement was made in furtherance thereof.

(6) No statement made by a conspirator after the termination of a conspiracy is admissible against anyone but the maker.

(7) Proof only of several separate conspiracies between individual Defendants and the German Consul would be insufficient to establish the existence of a general conspiracy under an indictment which alleged that each Defendant conspired 'with each other'.

(8) The mere continuation of the results of a crime does not continue the crime. *U. S.* v. *Irvine*, 98 U. S. 450; *U. S.* v. *Meyer*, 220 F. 800.

(9) To hold that a conspiracy was a continuing one because a result was continued without showing any overt acts since the hatching of the conspiracy would nullify the statute of limitations and permit a prosecution years after the statute had run, merely because the results might go marching on."

The majority opinion makes quite a point of the comprehension of the jury of the issues involved. We respectfully disagree. We feel and urge that the jury was so confused by the charge of the trial judge that they did not fully comprehend the issues to be decided by them and that under proper instructions even though the issues were left to the jury, the result would have been an acquittal.

POINT V.

The Trial Court erred in refusing to charge the jury as requested by the defendants and the Circuit Court of Appeals erred in upholding the Trial Court in this respect.

(Assignment of Error 6.)

The Court refused to charge the jury as requested by the defendants in the following respects:

> "11. If you find that the defendant Fiswick did not disclose in his registration statement that he was a member of the Nazi party in the United States because he did not believe or understand that he was a member and that he had only applied for membership in the expectation of returning to Germany, even though he continued to pay dues and that he honestly believed that he should say 'I have not' in completing No. 15 in his registration statement, then your verdict as to that defendant must be not guilty."

> "15. Before you can find a defendant guilty as charged in this indictment you must find (1) that he conferred with Draeger or Vogel or with someone in the office of the German Consulate with respect to registration under the act of 1940; (2) that in preparing his statement he intentionally followed the advice or instructions received at the Consulate to make a false statement concerning his membership or non-membership in the Nazi party and did not do so as his own and independent action or from motives of his own not the result of the advice or instructions received."

"16. If you find from the evidence that a defendant filed a false registration statement that in itself is not enough. You must also find that it was so filed as the result of an agreement on his part with another or others named in the indictment so to do."

"17. If you find that a defendant merely filed a false or inaccurate registration statement without consulting with or taking advice or instructions from named defendants or named co-conspirators such as Draeger or Vogel or other employees in the German Consulate, then your verdict as to that defendant must be not guilty."

"18. There is no issue in this case as to whether or not the representatives in the United States of the Nazi party were engaged in activities to promote the interests and ideology of the party in this country. The issue is whether or not the defendant here on trial conspired with other defendants or co-conspirators named in the indictment to file false alien registration statements required by the act of Congress of 1940 with respect to their individual activities, or their affiliation with or activities in (as a member, official of or worker for) the Nazi party either here or elsewhere. It is important that you keep the issue clear in your minds during your deliberation. For you to find that a particular defendant merely filed a false or misleading registration statement is not sufficient to convict him of the charge. You must find that he not only deliberately filed such false or misleading registration statement with intent to deceive but that he did so as the result of an agreement entered into by him with one or more of the defendants or co-conspirators named in the indictment so to do."

We feel that these requests were proper instructions and the subject matter thereof was not sufficiently covered in the charge of the Court. If our view of the law is correct, as heretofore argued, it was prejudicial error not to charge the jury as requested and the Circuit Court of Appeals erred in overruling this contention.

Truly the issues in this case were as to whether or not the defendants on trial had conspired with each other or anyone else named in the indictment. The mere filing of a false registration statement is not proof of a conspiracy and unless the jury could find that there was a concert of agreement and action on the part of the ones named in the indictment there could be no conspiracy. Failure of the trial Judge to so charge the jury was reversible error and the Circuit Court of Appeals should not have sustained this refusal.

Conclusion.

For the reasons advanced we urge that the judgment of conviction against the defendants-appellants should be set aside.

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Appellants.

Form AR-1

Excerpt from Defendants' Exhibit 2.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
ALIEN REGISTRATION DIVISION
WASHINGTON, D. C.

THE NATIONAL REGISTRATION OF ALIENS
INSTRUCTIONS FOR REGISTRATION AND SPECIMEN FORM

Page 2

INSTRUCTIONS FOR SPECIMEN FORM

* * * * * * *

Item 10. ACTIVITIES.—State your activities during the past 5 years, either in the United States or abroad, other than as shown by your statements regarding present or usual occupation. Give the approximate dates of such activities.

* * * * * * *

Item 15. ACTIVITIES FOR FOREIGN GOVERNMENT.—Write "have" or "have not" according to the fact. If you write "have," state position held, length of time, nature of duties or activities, compensation received, and names of any such clubs, organizations, or societies. If you have been employed by any foreign government or subdivision thereof, the nature of the employment and the approximate dates should be stated.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 51.

FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF ON BEHALF OF PETITIONERS.

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioners,
744 Broad Street
Newark 2, New Jersey

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

INDEX

PAGE

ARGUMENT.

I. The cause is not moot as to petitioner Fiswick. 2

II. The error committed in the trial court was not harmless as urged by the Government in its brief nor have petitioners gone beyond the reasons presented for the writ in their argument 4

CASES CITED.

Kotteakos v. *United States*, Adv. Sheets L. Ed. Vol. 90, page 1178 5

St. Pierre v. *United States*, 319 U. S. 41 2

STATUTES.

Title 8 U. S. C. Sec. 155 3

Title 18, Sec. 753(f) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 51.

FERDINAND FISWICK, JACOB F. MAYER, and
FRITZ GUSTAV RUDOLPH,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF ON BEHALF OF PETITIONERS.

In the brief filed for the United States in the above matter, the Government argues under its first point that the cause as to petitioner Fiswick is moot. Under the second point it argues that while it was error for the trial court to permit the jury to consider each "petitioner's" statements to the F. B. I. as evidence against the other "petitioners", it ignores the fact that the statements of the *other* defendants who were on trial were also admitted, and urges that the admission of petitioners' statements was harmless error. We feel that a short reply is necessary.

ARGUMENT.

I.

The cause is not moot as to petitioner Fiswick.

Fiswick, at the time he entered his plea on October 16th, 1944, was in the custody of the Attorney General on Ellis Island, New York, interned as an alien enemy and remained there. The trial started on November 27th, 1944, and Fiswick was produced in Court daily from Ellis Island. On December 21st, 1944, he was brought to Court from Ellis Island when he was sentenced to imprisonment for the term of eighteen months, and was placed in the custody of the Attorney General again, who had the power under the statute to designate the place of confinement, (Title 18, Sec. 753(f)) (R. 1-7). Fiswick was then sent from Ellis Island to the Federal House of Correction at Danbury, Connecticut, and the records will show that after he had served the term imposed by the Court he was not "unconditionally released" but was returned to Ellis Island, still in the custody of the Attorney General.

Subsequently, after hearings with respect to his status as an alien enemy, he was paroled but of course subject to be re-interned. Government records will confirm these statements.

Fiswick's cause is far from moot and is totally different from the case of *St. Pierre*, which is the case relied upon by the Government in urging this point, (*St. Pierre* v. *United States*, 319 U. S. 41). In that case St. Pierre had served a term of five months for criminal contempt of court

because of refusal to testify before a Grand Jury, and the writ of certiorari was granted after the service of the term.

In that case the Court in holding the cause to be moot stated:

> "Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

The status of Fiswick is quite different because, as the Government concedes, under Title 8 U. S. C. Sec. 155, he may still be deported. This is certainly a further penalty which may be imposed if the conviction stands. Even if he should not be deported this conviction will certainly operate unfavorably when his pending application for citizenship is presented to the Court.

While it is true that Fiswick's "last entry" into the United States as set forth in the Government's brief was in 1937, he first came to the United States in January, 1929, and has lived here ever since, excepting for two short visits that he made to Germany in 1932 and in 1937, the first to see his sick father and the second, to visit his parents-in-law with his bride (R. 214, 215). We merely state this to show that he has resided in this country for many years.

II.

The error committed in the trial court was not harmless as urged by the Government in its brief nor have petitioners gone beyond the reasons presented for the writ in their argument.

As we have heretofore called to the attention of the Court in our brief, there were 31 defendants named in the indictment as well as 3 named as co-conspirators, the indictment was severed as to 14 of the defendants, 5 retracted and entered pleas of guilty and the indictment was moved as to 12 of the defendants. 1 retracted and entered a plea of guilty during the trial, and as to another the indictment was dismissed. The statements made by the 10 remaining defendants, including the 3 who appeal, were submitted to the jury, that is, the statements made by 7 others besides those of the 3 petitioners.

The Government complains that the argument which we have made in our brief goes beyond the questions presented when we applied for the writ of certiorari. The second question presented was as follows: Are statements made by defendants not in the presence of each other, and years after the commission of the last overt act charged in a conspiracy indictment, admissible to prove the existence of the conspiracy charged, and its continuance.

In the first point in our argument we have endeavored to show that the Government failed to prove the conspiracy charged.

In our second point we have endeavored to show that the admission of statements made by defendants on trial,

was not only improper for the purpose of proving the *corpus delicti* but also to prove the continuance of the conspiracy charged, down to the date of the filing of the indictment.

In our third point in urging that there was no proof of any intentional falsification in the original registration statements filed by all the defendants in 1940, we feel that this also goes to the question as to whether or not any conspiracy was proved at the trial.

The errors alleged in the charge of the trial court and its refusal to charge as set forth in our further points, are all bound up with the question as to whether or not there was a conspiracy either with or without the statements admitted in evidence, and how the jury should consider the matter in reaching a verdict after the Court had refused to direct a verdict.

The statements of defendants admitted in evidence should not be considered as harmless error. As we have attempted to show in our brief, either with or without them, there was insufficient proof to be submitted to the jury either of the conspiracy charged in the indictment or the continuance thereof.

We also contend that if this Court upholds the view that the statements herein referred to were improperly admitted by the trial court then in charging the jury the Trial Court erred not only in the charge made to the jury but also in the failure to charge as requested.

We urge that the decision in *Kotteakos* vs. *United States* cited in the Government's brief and reported in the advance sheets of the Law Edition in Vol. 90 page 1178, fully sup-

ports our contention that the admission in evidence of the statements made by petitioners and other defendants on trial cannot be considered harmless as no one can determine what effect they may have made upon the jury in reaching its verdict. So far as petitioner Fiswick's cause is concerned, if this Court holds that the statements referred to were improperly admitted, the lower courts, in obedience to the mandate of this Court, should direct a reversal of the judgment of the District Court and not direct a re-trial of the case.

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Appellants.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 5 1946
CHARLES ELMORE CROPLEY
CLERK

No. 909 51

In the Supreme Court of the United States

OCTOBER TERM, 1945

FERDINAND FISWICK, JACOB F. MAYER, AND FRITZ GUSTAV RUDOLPH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	5
Argument	13
Conclusion	20

CITATIONS

Cases:

Ausmeier v. *United States*, 152 F. 2d 349	17, 18
Bellanda v. *United States*, 25 F. 2d 1, certiorari denied, 277 U. S. 607	14, 19
Brown v. *Elliott*, 225 U. S. 392	14
Burns v. *United States*, 279 Fed. 982	20
Delaney v. *United States*, 263 U. S. 586	14
Eldredge v. *United States*, 62 F. 2d 499	14
Fraina v. *United States*, 255 Fed. 28	15
Hudspeth v. *McDonald*, 120 F. 2d 962, certiorari denied, 314 U. S. 617	18
Kolbrenner v. *United States*, 11 F. 2d 754, certiorari denied, 271 U. S. 677	15
Laska v. *United States*, 82 F. 2d 672, certiorari denied, 298 U. S. 689	18
Landay v. *United States*, 108 F. 2d 698, certiorari denied, 309 U. S. 681	14
Lee Moy v. *United States*, 237 Fed. 50	19
Logan v. *United States*, 144 U. S. 263	14
Marcus v. *United States*, 20 F. 2d 454, certiorari denied, 275 U. S. 565	15
McDonald v. *United States*, 89 F. 2d 128, certiorari denied, 301 U. S. 697	18
Meyers v. *United States*, 36 F. 2d 859, certiorari denied, 281 U. S. 735	15
Morrow v. *United States*, 11 F. 2d 256	14
Murray v. *United States*, 10 F. 2d 409, certiorari denied, 271 U. S. 673	14, 19
Nyquist v. *United States*, 2 F. 2d 504, certiorari denied, 267 U. S. 606	14
Ramus v. *United States*, 291 Fed. 501	15
Rettich v. *United States*, 84 F. 2d 118	18
Ryan v. *United States*, 99 F. 2d 864, certiorari denied, 306 U. S. 635	19

688503—46——1

Cases—Continued. Page

Steere v. *United States*, 192 Fed. 1 15
Sullivan v. *United States*, 7 F. 2d 355, certiorari denied, 270 U. S. 648 14
United States v. *Downing*, 51 F. 2d 1030 15
United States v. *Goodman*, 129 F. 2d 1009 14
United States v. *Irvine*, 98 U. S. 450 16
United States v. *Kissel*, 218 U. S. 601 14
United States v. *McGuire*, 64 F. 2d 485, certiorari denied, 290 U. S. 645 19
Warszower v. *United States*, 312 U. S. 342 19
Wiborg v. *United States*, 163 U. S. 632 14
Worthington v. *United States*, 1 F. 2d 154, certiorari denied, 266 U. S. 628 15

Statutes:

Section 37 of the Criminal Code, 18 U. S. C. 88 ..... 2, 5
Alien Registration Act, 1940, c. 439, Title III, 54 Stat. 670, 673–676, 8 U. S. C. 451–460:
Sec. 31 3
Sec. 33 3
Sec. 34 3
Sec. 36 4

Miscellaneous:

Regulations governing registration of aliens, issued August 8, 1940, 5 F. R. 2836–2841:
Sec. 29.4(l) (10) 4
Sec. 29.4(l) (15) 5

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 909

FERDINAND FISWICK, JACOB F. MAYER, AND FRITZ GUSTAV RUDOLPH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 352–364)[1] and the dissent (R. 364–372) are not yet reported.

[1] The record filed by petitioners consists of the printed appendix to their brief in the circuit court of appeals, together with the proceedings in that court. This record contains the bill of exceptions in abridged form. There have also been lodged with the Clerk of this Court the original exhibits in the case. These have been transmitted, at our request, by the Clerk of the Circuit Court of Appeals.

References to the printed appendix in this brief omit the "a" which follows upon the numbering on pages 1a to 351a.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 10, 1945 (R. 373), and a petition for rehearing (R. 374–385) was denied on January 26, 1946 (R. 387). The petition for a writ of certiorari was filed on March 4, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to defraud the United States through the defendants' concealment of their connection with the Nazi Party, the indictment charging that the conspiracy continued to the date of its filing, September 13, 1944, and that various overt acts were committed, the latest of which occurred December 26, 1940, it was reversible error to admit as against all petitioners certain statements which each of them made after December 26, 1940, but before September 13, 1944.

STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. 88, provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States

in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The pertinent provisions of the Alien Registration Act, 1940 (Act of June 28, 1940, c. 439, Title III, 54 Stat. 670, 673–676, 8 U. S. C. 451–460) read as follows:

SEC. 31. (a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 30 [registration of aliens seeking visas to enter the United States], and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

* * * * *

SEC. 33. (a) All applications for registration and fingerprinting under section 31 shall be made at post offices or such other places as may be designated by the Commissioner [of Immigration and Naturalization].

* * * * *

SEC. 34. (a) The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this title. Such forms shall contain inquiries with respect to (1) the

date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General.

SEC. 36. * * *

(c) Any alien * * * who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; * * *.

Regulations governing the registration of aliens under the Alien Registration Act, 1940, were issued by the Acting Commissioner of Immigration and Naturalization on August 8, 1940, with the approval of the Attorney General (see 5 F. R. 2836-2841). Section 29.4 (l) of those regulations provides in part as follows:

(10) The alien, if fourteen years of age or older, shall state any activities in addition to his occupation in which he is, has been within the past five years, or intends to be engaged. The alien shall list the names of all clubs, lodges, groups, organizations, or societies to which he belongs

or in which he participates. If the alien holds any office or official position in any of these clubs, lodges, groups, organizations, or societies, he shall so state.

* * * * *

(15) The alien, if fourteen years of age or older, shall state whether, during the past five years, he has been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government. If the alien has been affiliated with or active in any such groups or organizations, he shall list them. If he holds an office or official position in any such group or organization, he shall so state. The registration officer shall not undertake to enumerate or define any such groups or organizations.

STATEMENT

An indictment in one count was returned against petitioners and 28 others in the United States District Court for the District of New Jersey on September 13, 1944, charging the defendants with conspiring to defraud the United States in violation of Section 37 of the Criminal Code, 18 U. S. C. 88 (R. 1, 10–21; *supra*, pp. 2–3). The indictment alleged that the defendants, between September 1, 1939, and the date when the indictment was returned, conspired with each other

and with Friedhelm Draeger, Hans Vogel and Fritz Zeglin, with the German Ambassador to the United States and members of his staff, and with other representatives of Germany, to defraud the United States of its governmental function of securing a "full and complete listing and fingerprinting of all aliens residing * * * within the United States, their * * * membership in and affiliation with any * * * organizations devoted to furthering the political activities, public relations and public policy of foreign governments, and their participation in the meetings and activities of such * * * organization" (R. 11–12). The indictment then alleged that during the summer of 1941, and for five years previously, Draeger had been the German consul in New York and leader of the "overseas portion" of the Nazi Party, that during the same period Vogel, in his capacity as Draeger's secretary, was engaged in matters concerning the operation of the Party and its members in the United States; and that since 1933 the Party in the United States was an organization devoted to furthering the political activities of the German Government (R. 12–13). It was further charged that, as a part of the conspiracy, Draeger, Vogel, and the German Ambassador would direct the defendants, in registering under the Alien Registration Act, to conceal and to falsify their connection with the Nazi Party and that the defendants would accept such direc-

tions; and that the defendants would continue after the fall and early winter of 1940 to misrepresent to the United States their connection with the Nazi Party to the end that the United States would continue to be deprived of accurate information concerning the defendants' connection with the Nazi Party and to the end that the policies of the German Government would be furthered (R. 14–15).

The indictment set forth forty overt acts alleged to have been committed pursuant to the conspiracy and to effect its objects (R. 16–21). The first overt act was alleged to have been committed in July 1938 (No. 34, R. 20), the last, on December 26, 1940 (No. 24, R. 19).

After a jury trial, petitioners were convicted (R. 6);[1] petitioners Fiswick and Rudolph were each sentenced to imprisonment for a term of eighteen months, and petitioner Mayer was sentenced to imprisonment for a term of a year and a day (R. 7–8). On appeal to the Circuit Court of Appeals for the Third Circuit, the judgments of conviction were affirmed (R. 353–364, 373), one judge dissenting (R. 364–372).

Petitioners do not challenge the sufficiency of the evidence to support the verdicts of guilty.

[1] Fourteen of the defendants were granted a separate trial (R. 4); six of the defendants pleaded guilty (R. 4–5); the indictment was dismissed as to one of the defendants (R. 6). Of the seven defendants who stood trial, in addition to petitioners, the jury acquitted three and disagreed as to the other four (R. 6).

They contend (Pet. 3, 4, 11–13) that reversible error was committed in the admission of certain evidence. We here summarize such portions of the evidence material to a consideration of petitioners' contention.

Government witness Illian was employed by the German Consulate in New York City as a stenographer from March 1939 to May 1941 (R. 23, 73). She worked under the direction of Vogel, one of the conspirators. Vogel was secretary to another conspirator, Draeger, the New York district leader of the Nazi Party (R. 24–25, 26–27, 73–74). There was kept in the office of the Consulate a card file of members of the Party and applicants for membership in the Party (R. 31–32, 48, 81). In the early part of 1940 the witness prepared from the card file a list of members of and applicants for membership in the Party (R. 47–48, 50, 53, 82). The names of petitioners appeared on this list. (Gov. Ex. 17).[3] Shortly after the list was prepared the card file was destroyed (R. 50–51, 83).

In August or September 1940, Draeger sent letters to members and prospective members of the Party requesting them to call at his office for the purpose of discussing a personal matter (R. 57, 59, Gov. Ex. 36).[4] When they appeared in re-

[3] The names on this list were arranged numerically; Fiswick was No. 449, Mayer, No. 230, and Rudolph, No. 612.

[4] The letter read as follows:

"I hereby request you to look me up at the Consulate General as soon as possible for the purpose of discussing a personal matter.

Heil Hitler."

sponse to the letter, they were told by either Draeger or Vogel that in registering under the Alien Registration Act they were "not to put the fact in that they were members of the National Socialist Party" (R. 59, 64, 101–103, 112–113). Each of petitioners registered under that Act in December 1940 (R. 321–325). Item 10 on the Alien Registration Form read as follows (R. 321; see *supra*, pp. 4–5):

> I am, or have been within the past 5 years, or intend to be engaged in the following activities:
> In addition to other information, list memberships or activities in clubs, organizations, or societies.

Item 15 on the form read as follows (R. 321; see *supra*, p. 5):

> Within the past 5 years I_____
> (have, have not)
> been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations or public policy of a foreign government.

In the blank space in item 15 each of petitioners inserted the words "have not"; in respect of item 10, petitioners Fiswick and Rudolph stated, "none," while petitioner Mayer stated, "Reichsdeutshe Vereingung, New York, N. Y."

After some members of the Party had registered, it appears that certain of them were told

by Draeger or Vogel to amend their registration forms by stating that they were non-resident members of the Party (R. 64–67, 88; Gov. Ex. 38, 39).[5] Petitioners do not claim that they received these amendatory instructions.[6]

Each of the petitioners made oral and written statements to the Federal Bureau of Investigation, which were received as against all of the defendants (R. 128–148, 189–190, 192–194, 197–199, 327–341). On November 22, 1943, petitioner Mayer, in an interview with an agent of the Federal Bureau of Investigation, denied that he was a member of the Nazi Party (R. 129, 139). In an interview on the following day, Mayer told the agent that he had applied for membership in the Nazi

---

[5] Gov. Ex. 39 is a form letter addressed to the United States Department of Justice, Immigration and Naturalization Service, Alien Registration Division, and reads as follows:

"I have previously registered as an alien under the above number on the form provided for that purpose. I assumed from the wording of questions Nos. 10 and 15, that these questions referred to present activities.

"However, in order to avoid any misunderstanding I wish to amend my registration so that the same shall show that I am a non-resident member of the National Socialistic German Labor Party since ----------, but have not been actively engaged in any way in said party, or on its behalf, and am not engaged in political activities in this country."

Defendants Borchardt and Ulrich filed amendatory statements that they were non-resident members of the Party (Gov. Ex. 1B and 1D).

[6] The following statement concerning these instructions appears at page 11 of petitioners' brief in the court below: "There was no proof whatsoever that any of these came into the hands of the defendants."

Party and that upon Vogel's instructions he had failed to "list his membership" when registering in 1940 (R. 140–141). He also said at this time that the reason he had not disclosed his membership the day before was because Vogel had told him not to admit his membership in the Nazi Party (R. 147). On the same day, Mayer made a written statement to the same effect. He also stated therein that Vogel told him [illegible] in respect of item 10, "Reichsdeut[illegible] New York, N. Y."; that he had never heard of that organization and was not a member thereof (R. 327–329). Petitioner Fiswick, in an interview with an F. B. I. agent on April 29, 1944, said that he had told an Alien Enemy Hearing Board on January 7, 1944, that he was not a member or prospective member of the Nazi Party and had given the same information at an earlier interview with the F. B. I. At this interview, Fiswick first reiterated his denial of connection with the Nazi Party, but then said he wanted to tell the truth (R. 192–194). Fiswick then signed a statement in which he said that he had applied for membership in the Nazi Party in 1939, and that in 1940 Vogel had told him and four other applicants for membership that they were not required "to put down in the Alien Registration form of 1940 that we were members" (R. 329–331). Petitioner Rudolph, in an interview with an F. B. I. agent on November 17, 1943, and in a written statement made the same day,

stated that he had applied for membership in the Nazi Party and that an official of the German Consulate had told him in 1940 that in the event he was questioned in registering as an alien concerning his membership in the Party, he should deny his membership (R. 197–199, 337–338). In a signed statement executed by Rudolph on September 5, 1944, he said that in failing to reveal his membership in registering as an alien in 1940 and again in 1942, he had not acted upon anyone's instructions (R. 339–341). At the trial which was held in November and December 1944 (R. 5), Rudolph testified that what he had said in his statement of September 5, 1944, was the truth (R. 244, 248).

In respect of petitioners' statements, the trial judge ruled that each of them was admissible as against the other defendants. He stated in this connection that "the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there is such continuous cooperation." Petitioners excepted to this ruling (R. 205–206).

In his charge to the jury, the judge said (R. 290):

> There have been admitted into evidence certain statements, written statements and verbal admissions made by conspirators, of activities done in furtherance of the object

of the conspiracy; and these admissions and statements are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it. I have ruled that this is a continuing conspiracy, and * * * I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of proving the conspiracy itself, but simply to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the conspiracy.

ARGUMENT

The only contention advanced by petitioners (Pet. 3, 6–7, 10–12) is that the trial judge committed reversible error in admitting, as against all of them, their individual statements to agents of the F. B. I., made after December, 1940, the date of the last overt act alleged in the indictment. Proceeding on the assumption that the conspiracy was one to defraud the Government "by preventing it from obtaining * * * information to which it was entitled, by the defendants filing false Alien Registration Statements in the fall of 1940 and failing to disclose the membership of the individual defendants in the Nazi Party" (Pet. 10–11), and that this conspiracy was at an

end when the defendants filed those statements, petitioners argue that the admission of the individual statements as against all of them on the theory that the conspiracy continued down to the date of the filing of the indictment, viz: September 13, 1944, was prejudicially erroneous (Pet. 11–13). We submit that no reversible error was committed in the respect claimed by petitioners.

It is a well-settled principle in conspiracy cases that the acts or declarations of one conspirator are admissible against co-conspirators if those acts or declarations were made while the conspiracy was pending and in furtherance of its object, but that such declarations are not so admissible when they are only a narrative of past fact.[1] It is also settled that a conspiracy may be a continuous offense enduring until its purpose has been consummated or until it is abandoned.[2] And, in proving a conspiracy, the

[1] *Logan* v. *United States*, 144 U. S. 263, 308–309; see also *Delaney* v. *United States*, 263 U. S. 586, 590; *Wiborg* v. *United States*, 163 U. S. 632, 657–658; *United States* v. *Goodman*, 129 F. 2d 1009, 1013 (C. C. A. 2); *Landay* v. *United States*, 108 F. 2d 698, 703 (C. C. A. 6), certiorari denied, 309 U. S. 681; *Morrow* v. *United States*, 11 F. 2d 256, 259 (C. C. A. 8); *Murray* v. *United States*, 10 F. 2d 409, 411 (C. C. A. 7), certiorari denied, 271 U. S. 673; *Sullivan* v. *United States*, 7 F. 2d 355, 356 (C. C. A. 8), certiorari denied, 270 U. S. 648.

[2] See *Brown* v. *Elliott*, 225 U. S. 392, 400; *United States* v. *Kissel*, 218 U. S. 601, 607–608; *Eldredge* v. *United States*, 62 F. 2d 449, 450 (C. C. A. 10); *Bellande* v. *United States*, 25 F. 2d 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607; *Nyquist* v. *United States*, 2 F. 2d 504, 505 (C. C. A. 8), certio-

Government is not confined to the overt acts charged in the indictment.[9] Moreover, it is clear that the statements containing admissions were properly admitted in evidence against the declarants under the circumstances of this case. See *infra*, note 14, p. 19. Under these principles it becomes evident, we believe, that each petitioner's statement was admissible as against all of them in so far as they related to a denial of membership in or affiliation with the Nazi Party, and that in so far as they contained admissions of such membership or affiliation and concealment thereof pursuant to the instructions of Draeger or Vogel, they were admissible, though not against all, since in that respect they were only narrative declarations of past fact. But, as we will show, *infra*, pp. 19–20, the admission of these latter declarations of past fact against all the petitioners could not have been prejudicial error.

---

rari denied, 267 U. S. 606; *Remus* v. *United States*, 291 Fed. 501, 504–505 (C. C. A. 6); *Steers* v. *United States*, 192 Fed. 1, 8 (C. C. A. 6).

[9] *United States* v. *Downing*, 51 F. 2d 1030, 1031 (C. C. A. 2); *Meyers* v. *United States*, 36 F. 2d 859, 860 (C. C. A. 3), certiorari denied, 281 U. S. 735; *Marcus* v. *United States*, 20 F. 2d 454, 456 (C. C. A. 3), certiorari denied, 275 U. S. 565; *Kolbrenner* v. *United States*, 11 F. 2d 754, 756 (C. C. A. 5), certiorari denied, 271 U. S. 677; *Worthington* v. *United States*, 1 F. 2d 154, 155 (C. C. A. 7), certiorari denied, 266 U. S. 626; *Fraina* v. *United States*, 255 Fed. 28, 35 (C. C. A. 2).

Several of the overt acts specified in the indictment were proved. *E. g.*, Nos. 18, 26, and 33, that each petitioner filed an alien registration form (see R. 18–20, 320–325).

Contrary to petitioners' assertion (*supra*, pp. 13–14),[10] there is no basis in the record for their claim that the conspiracy came to an end with the filing of the registration forms in 1940. The indictment alleged specifically that after 1940 the conspirators, pursuant to the conspiracy, would continue to misrepresent their connection with the Nazi Party. It charged specifically that the conspiracy continued to the date when the indictment was filed, viz: September 13, 1944 (*supra*, p. 5). On this basis, petitioners' statements, in 1943 and 1944, denying their connection with the Nazi Party, were certainly admissible as against all of them, being plainly consistent with the allegations contained in the indictment and tending to support those allegations. As the majority of the court below said of petitioners' contention: "[It] completely overlooks not only the theory of the Government's case but the plain language of the indictment. The scheme did not end with false registration. The latter was essential but to accomplish the end result the concealment of Nazi membership had to be affirmatively maintained thereafter. A continuing conspiracy was specifically charged with the proof presented by the Government making

[10] *United States* v. *Irvine*, 98 U. S. 450, relied upon by petitioners (Pet. 6, 7, 12), held only that the crime of withholding a pension due another was not a continuing one; here, of course, there is no contention that a conspiracy cannot continue; the only question is how long it did continue.

it a jury question whether there was such a conspiracy." (R. 361)."

Nor does the decision of the Circuit Court of Appeals for the Second Circuit in *Ausmeier* v. *United States*, 152 F. 2d 349, which petitioners' cite (Pet. 7), avail them. In that case the conviction of the appellants who were prosecuted under a similar indictment was reversed because of the failure of the trial judge to instruct the jury adequately on what the court there regarded as a vital issue. Construing the indictment as charging a conspiracy to violate Section 36 (c) of the Alien Registration Act (*supra*, p. 4) by the defendants filing false statements, known by them to be false, the court concluded that the trial judge had not charged the jury "in unmistakeable language," as it thought he was required to do, that they must find that each of the defendants was a party to an agreement to file a registration form containing statements known by him to be false. 152 F. 2d at 356." But, so far as the

---

[11] Petitioners do not take exception to the holding of the majority of the court below that the trial judge "left to the jury the questions of whether there was a conspiracy and if so, whether such conspiracy continued" (R. 361).

[12] Petitioners do not claim that the judge's charge was inadequate for the reason set forth in the *Ausmeier* case, and we do not think they could urge such a claim successfully, even if the indictment is construed as charging merely a conspiracy to violate the Alien Registration Act. Here the judge charged the jury that they might "consider the reasons alleged for making representations which were made by any of these defendants, in determining whether they

opinion in the *Ausmeier* case indicates, there was not before the court the question whether the conspiracy could have survived the filing of the registration statements, and there is nothing in the opinion on that question. And even if it be assumed that the indictment here involved should be construed as charging a conspiracy to violate Section 36 (c) of the Alien Registration Act, it does not follow that the conspiracy expired with the filing of the registration statements. There is ample authority, including a decision by the same court which decided the *Ausmeier* case, for the proposition that where the conspiracy charged is one to commit a substantive offense, the commission of the offense does not *ipso facto* bring the conspiracy to a conclusion, and that it may continue until such time as the conspirators have attained the ultimate object of the conspiracy, whatever that may be, which led them to the commission of the substantive offense.[12]

---

were part of the conspiracy or whether they were acting from motives other than those which would indicate participation in the agreement to effectuate the object of the alleged conspiracy. You may ask yourselves whether or not any individual defendant acted in complete good faith and innocence of sharing in the charge of conspiracy." (R. 293.) We think that this instruction removes it from the criticism directed against the charge in the *Ausmeier* case.

[12] See *Hudspeth* v. *McDonald*, 120 F. 2d 962, 966 (C. C. A. 10), certiorari denied, 314 U. S. 617; *McDonald* v. *United States*, 89 F. 2d 128, 133, 134–135 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Rettich* v. *United States*, 84 F. 2d 118, 121 (C. C. A. 1); *Laska* v. *United States*, 82 F. 2d 672,

Here the conspiracy did not come to an end when the defendants filed registration statements in which they concealed their connection with the Nazi Party, since an object of the conspiracy was the continued concealment thereafter of such connection.

We have indicated, *supra*, pp. 14–15, that the admission into evidence, as against all petitioners, of those portions of each petitioner's statement admitting his connection with the Nazi Party and admitting that he had concealed such connection in registering under the Alien Registration Act upon Vogel's instructions (see *supra*, pp. 10–12) may not have been justified, since those portions of the statements were obviously not in furtherance of the conspiracy but were only narrative declarations of past fact. They were admissible, of course, as against the declarant,[14] and, since each

677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *United States* v. *McGuire*, 64 F. 2d 485, 493 (C. C. A. 2), certiorari denied, 290 U. S. 645; *Bellande* v. *United States*, 25 F. 2d 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607; *Murray* v. *United States*, 10 F. 2d 409, 411 (C. C. A. 7), certiorari denied, 271 U. S. 673; *Lew Moy* v. *United States*, 237 Fed. 50, 52 (C. C. A. 8).

[14] The rule requiring corroboration of a confession of crime (See *Warszower* v. *United States*, 312 U. S. 342; *Ryan* v. *United States*, 99 F. 2d 864, 869 (C. C. A. 8), certiorari denied, 306 U. S. 635), was, we think, satisfied. There was independent proof of the conspiracy and petitioners' participation therein in the form of the list of members and prospective members on which petitioners' names appeared, through testimony by the Government witnesses that Draeger and Vogel had instructed such persons to conceal their con-

petitioner himself admitted in his statement substantially what the other petitioners said in their statements, none could have been harmed by the instruction that the jury could consider each statement as evidential against all petitioners. Cf. *Burns* v. *United States*, 279 Fed. 982, 986 (C. C. A. 8).

CONCLUSION

The decision below is correct. There is no conflict of decisions nor any other reason for further review. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

APRIL 1946.

---

nection with the Nazi Party, in that petitioners did not state any connection with the Party in registering as aliens, and in that they subsequently continued to deny such connection (see *supra*, pp. 8–12).

U. S. GOVERNMENT PRINTING OFFICE: 1946

FILE COPY

Supreme Court, U. S.
FILED
NOV 6 1946
CHARLES ELMORE CROPLEY
CLERK

No. 51

In the Supreme Court of the United States

OCTOBER TERM, 1946

FERDINAND FISWICK, JACOB F. MAYER, AND FRITZ GUSTAV RUDOLPH, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	6
Summary of argument	28
Argument:	
I. The cause is moot as to petitioner Fiswick and, therefore, the writ of certiorari should be dismissed as to him	33
II. While it was error to permit the jury to consider each petitioner's statements to the F. B. I. as evidence against the other petitioners, the error was not harmful since it cannot reasonably be said that it substantially influenced the jury's verdict	37
A. The admission of each petitioner's statements against the other petitioners was error	42
B. The error was harmless	46
III. Questions now urged by petitioners but not presented by their petition for certiorari	54
Conclusion	60

CITATIONS

Cases:	
Anderson v. *United States*, 124 F. 2d 58, reversed on other grounds, 318 U. S. 350	52
Bannon and Mulkey v. *United States*, 156 U. S. 464	44
Beard v. *United States*, 82 F. 2d 837, certiorari denied, 298 U. S. 655	53
Bergdoll v. *United States*, 279 Fed. 404, certiorari denied, 259 U. S. 585	36
Bradley, In re, 318 U. S. 50	36
Brown v. *United States*, 150 U. S. 93	42, 45
Clune v. *United States*, 159 U. S. 590	44
Delaney v. *United States*, 263 U. S. 586	44
Dowdy v. *United States*, 46 F. 2d 417	45
Evans v. *United States*, 122 F. 2d 461, certiorari denied, 314 U. S. 698	49
Forte v. *United States*, 94 F. 2d 236	49
Gambino v. *United States*, 108 F. 2d 140	45
General Pictures Co. v. *Electric Co.*, 304 U. S. 175	55

717940—46——1

Cases—Continued

	Page
George v. *United States*, 125 F. 2d 559	52
Glasser v. *United States*, 315 U. S. 60	49, 56
Guarneri v. *Kessler*, 98 F. 2d 580	35
Hauger v. *United States*, 173 Fed. 54	45
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229	49
Hyde v. *United States*, 225 U. S. 347	55
Jordan v. *United States*, 60 F. 2d 4, certiorari denied, 287 U. S. 633	49
Kotteakos v. *United States*, Nos. 457 and 458, last Term, decided June 10, 1946	30, 31, 42, 47, 54
Logan v. *United States*, 144 U. S. 263	42, 45
Miller v. *Aderhold*, 288 U. S. 206	36
Miller v. *United States*, 24 F. 2d 353, certiorari denied, 276 U. S. 638	42
National Licorice Company v. *Labor Board*, 309 U. S. 350	53
People v. *Lorraine*, 90 Cal. App. 317	55
Pinkerton v. *United States*, No. 719, last Term, decided June 10, 1946	44
Ryan v. *United States*, 99 F. 2d 864, certiorari denied, 306 U. S. 635	49, 52
St. Pierre v. *United States*, 319 U. S. 41	28, 34, 36
Sorenson v. *United States*, 143 Fed. 820	45
State v. *Smith*, 33 Nev. 438	53, 54
United States, Ex parte, 242 U. S. 27	36
United States v. *Ausmeier*, 152 F. 2d 349	57
United States v. *Corso*, 100 F. 2d 604	45
United States v. *Dawe*, 149 F. 2d 491	57
United States v. *Di Orio*, 150 F. 2d 938, certiorari denied, 326 U. S. 771	49
United States v. *Hannon*, 105 F. 2d 590	53
United States v. *Johnson*, 319 U. S. 503	56
United States v. *Koenger*, 149 F. 2d 492, certiorari denied, 326 U. S. 725	57
United States v. *Lonardo*, 67 F. 2d 883	45
United States v. *Noveck*, 271 U. S. 201	42
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	44
U. S. ex rel. Berlandi v. *Reimer*, 30 F. Supp. 767, affirmed, 117 F. 2d 429	35
Van Dam v. *United States*, 23 F. 2d 235	45
Wiborg v. *United States*, 163 U. S. 632	44

Statutes:

Act of August 24, 1942, c. 555, 56 Stat. 747:	
Section 1	41
Section 1 (as amended July 1, 1944, c. 358, 58 Stat. 649, 667, 18 U. S. C., Supp. V, 590a)	41

Statutes—Continued — Page

Alien Registration Act, 1940 (Act of June 28, 1940, c. 439, Title III, 54 Stat. 670, 672–676, 8 U. S. C. 451–460):
Sec. 31 (a) — 3
Sec. 33 (a) — 3
Sec. 34 (a) — 3
Sec. 36 (c) — 4
Criminal Code, Sec. 37; 18 U. S. C. 88 (the conspiracy statute) — 2
Judicial Code, Sec. 269, as amended; 28 U. S. C. 391 (the harmless error statute) — 5, 46
8 U. S. C. 155 — 35, 37
18 U. S. C. 582 — 41

Miscellaneous:
Criminal Appeals Rules of May 7, 1934, Rule 5 — 33
H. Rep. 2051, 77th Cong., 2d sess. — 42
Regulations governing the registration of aliens under the Alien Registration Act, 1940 (5 F. R. 2836–2841):
§ 29.3 (a) — 4
§ 29.4 (l) (10) — 4
§ 29.4 (l) (15) — 5
S. Rep. 1544, 77th Cong., 2d sess. — 42
Supreme Court Rules, Rule 38 — 33

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 51

FERDINAND FISWICK, JACOB F. MAYER, AND FRITZ GUSTAV RUDOLPH, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 290–301) [1] and dissenting (R. 301–309) opinions in the circuit court of appeals are reported at 153 F. 2d 176.

JURISDICTION

The judgment of the circuit court of appeals was entered December 10, 1945 (R. 310), and a

[1] Pursuant to stipulation, the printed record consists of petitioners' printed appendix to their brief in the court below and the proceedings in that court. References to the printed record are designated "R." That record contains the bill of exceptions in abridged form. The stipulation provides that either party may refer to the certified stenographic transcript of the record on appeal below, including the original exhibits (R. 319–320). This transcript and the exhibits have been forwarded to this Court by the clerk of the court below. References to the transcript are designated "Tr."

petition for rehearing (R. 311–317) was denied January 26, 1946 (R. 318). The petition for a writ of certiorari was filed March 4, 1946, and was granted April 22, 1946 (R. 319). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the cause is moot as to petitioner Fiswick.

2. Whether, in petitioners' trial for conspiracy to defraud the United States, it was reversible error to permit the jury to consider as evidence against each petitioner statements made by the others to F. B. I. agents narrating the makers' participation in the conspiracy.[2]

STATUTES AND REGULATIONS INVOLVED

The conspiracy statute (Section 37 of the Criminal Code; 18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in

[2] This question is the only one which was presented by the petition for a writ of certiorari. Petitioners in their brief on the merits urge several additional questions. In respect of these the Government's position is that petitioners should not be permitted to have the benefit of a review of these questions. We discuss this matter, as well as the questions, at pp. 54–60, *infra*.

any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The pertinent provisions of the Alien Registration Act, 1940 (Act of June 28, 1940, c. 439, Title III, 54 Stat. 670, 673–676; 8 U. S. C. 451–460), are:

SEC. 31. (a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 30 [registration of aliens seeking visas to enter the United States], and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

* * * * *

SEC. 33. (a) All applications for registration and fingerprinting under section 31 shall be made at post offices or such other places as may be designated by the Commissioner [of Immigration and Naturalization].

* * * * *

SEC. 34. (a) The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this title. Such forms shall contain inquiries with respect to (1) the date and

place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General.

SEC. 36. * * *

(c) Any alien * * * who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; * * *.

Regulations governing the registration of aliens under the Alien Registration Act, 1940, were issued by the Acting Commissioner of Immigration and Naturalization on August 8, 1940, with the approval of the Attorney General (see 5 F. R. 2836–2841). The relevant regulations were:

§ 29.3 (a) Registration shall commence on August 27, 1940. Any person in the United States on that date who is required to register and be fingerprinted, or to register, may do so at any time on or before December 26, 1940.

* * * * *

§ 29.4 (l)(10) The alien, if fourteen years of age or older, shall state any activities in addition to his occupation in which

he is, has been within the past five years, or intends to be engaged. The alien shall list the names of all clubs, lodges, groups, organizations, or societies to which he belongs or in which he participates. If the alien holds any office or official position in any of these clubs, lodges, groups, organizations, or societies, he shall so state.

* * * * *

§ 29.4 (l)(15) The alien, if fourteen years of age or older, shall state whether, during the past five years, he has been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government. If the alien has been affiliated with or active in any such groups or organizations, he shall list them. If he holds an office or official position in any such group or organization, he shall so state. The registration officer shall not undertake to enumerate or define any such groups or organizations.

The "harmless error" statute (Section 269 of the Judicial Code, as amended; 28 U. S. C. 391) provides:

* * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without re-

gard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

STATEMENT

A single count indictment was returned against petitioners and 28 others in the District Court for the District of New Jersey on September 13, 1944, charging the defendants with conspiring to defraud the United States, in violation of Section 37 of the Criminal Code, *supra*, pp. 2–3 (R. 1, 7–16). The indictment charged that the defendants continuously between September 1, 1939, and the date the indictment was returned conspired with each other and with Friedhelm Draeger, Hans Vogel and Fritz Zeglin, with the German Ambassador to the United States and members of his staff, and with other representatives of the Third German Reich, to defraud the United States of its governmental function of securing a "full and complete listing * * * of all aliens residing * * * within the United States, their * * * activities therein, * * * membership in and affiliation with any * * * organizations devoted to furthering the political activities, public relations and public policy of foreign governments, and their participation in the meetings and activities of such * * * organizati[redacted]" (R. 8).

The indictment alleged that during the summer of 1941, and for five years prior thereto,

Draeger, had been the German consul in New York City and leader of the "overseas portion" of the Nazi Party in the United States; that during the same period Vogel, in his capacity as Draeger's secretary, was engaged in matters concerning the operation and conduct of the Nazi Party and its members and activities in the United States; and that since 1933 the United States portion of the Party was an organization devoted to furthering the political activities and policy of the German Reich (R. 8–9). It was further alleged that during the five years preceding the fall and early winter of 1940, each of the defendants was a German national residing in the United States and a member of and affiliated with the Party; that as a part of the conspiracy, Draeger, Vogel, and the German Ambassador would direct the defendants, in registering under the Alien Registration Act, to conceal and to falsify their connection with the Nazi Party and that the defendants would accept such directions; and that the defendants would continue after the fall and early winter of 1940, "and from day to day thereafter," to misrepresent to the United States, "their agencies, departments and bureaus," their connection with and activities in the Nazi Party to the end that the defendants' concealments and misrepresentations made in connection with their registration under the Alien Registration Act would continue to prevent the

United States "during a National emergency" from obtaining complete and accurate information relating to the "membership, policy and activities of these defendants and others in the said Nazi Party in the United States, * * * all of which said information in said form under said Act of Congress was vital to the internal security of the United States" (R. 9–11). The indictment alleged that as a means of accomplishing the conspiracy the individual defendants would appear for registration and in registering would falsely and fraudulently fail to disclose their connection with and activities in the Nazi Party in the United States (R. 11).

The indictment set forth forty overt acts alleged to have been committed pursuant to the conspiracy and to effect its objects (R. 12–16). A large number of the overt acts related to instructions given by Draeger and Vogel to the defendants from September to December, 1940, in connection with registering under the Alien Registration Act;[3] a number of others related to the defendants registering under the Act in November and December, 1940.[4] The last overt act alleged to have been committed by any of the convicted defendants was the filing by petitioner Mayer on December 23, 1940, of his alien registration form (No. 18, R. 14).

[3] See Nos. 2, 3, 6–8, 10, 13, 17, 19, 20, 22, 32, 35, 39.

[4] See Nos. 9, 11, 14, 16, 18, 21, 23, 24, 26–28, 31, 33, 36, 40.

After a jury trial,[5] petitioners were convicted (R. 5):[6] petitioners Fiswick and Rudolph were each sentenced to imprisonment for eighteen months and petitioner Mayer to imprisonment for a year and a day (R. 6). On appeal to the Circuit Court of Appeals for the Third Circuit, the judgments of conviction were affirmed (R. 290–301), one judge dissenting (R. 301–309).

The evidence may be summarized as follows:[7]

Draeger, whose office was at the German Consulate in New York City, was the New York district leader of the Nazi Party in the United States. (R. 17, 20, 58–59, 83–84; see also Gov. Ex. 10, p. 9, Tr. 397; Gov. Ex. 18, 19, 21–35, Tr. 400). Vogel was Draeger's secretary; his work was "in connection with the activities of the Nazi Party" (R. 18, 20, 59, 84). Lilly Ilfian was employed by the German Consulate in New York City as a stenographer from March, 1939, to May, 1941 (R. 17, 58). She worked under Vogel's direction, taking care of matters pertaining to the Party (R.

[5] Six of the defendants pleaded guilty (R. 3–4); the indictment was dismissed as to another defendant (R. 5). Of the remaining twenty-four defendants, the case was severed as to fourteen (R. 3). Of the seven defendants, in addition to petitioners, who were tried in this case, the jury acquitted three and disagreed as to the other four (R. 5).

[6] The facts relating to the question whether the cause is moot as to petitioner Fiswick are set forth in the Argument, *infra*, pp. 33–37.

[7] In Gov. Ex. 18, for example, Draeger described himself as "Consul and District Leader of the Foreign Organization of the NSDAP."

18–22). Gustave Gauerke was a clerk in the commercial department of the German Consulate in New York City (R. 83). Emil Wilhelm Borchers, one of the defendants as to whom the case was severed, was a member of the Nazi Party in the United States. He had applied to Draeger for membership in 1935, telling Draeger that when he was in Germany he had been told to go to the Consulate on returning to the United States. (R. 87–88.) Illian, Gauerke, and Borchers were Government witnesses (R. 16–102).

Miss Illian testified that applications for membership in the Nazi Party were received at the office of the Consulate and that they were accepted by Vogel (R. 22). The application form stated: "I promise to give the Fuehrer unconditional obedience and as a loyal follower of the Fuehrer to serve the Party with all my strength" (Gov. Ex. 2, R. 271). Applications for membership were sent to Germany with a report by Draeger (R. 22). Applicants for membership were called "Parteianwaerter", and they received a "Parteianwaerter" or "prospective member" card which was issued at the office of the Consulate. Anwaerters retained their cards until they received membership cards or books which came from Germany. (R. 26, 62, 81.)

Miss Illian testified that she collected dues and that anwaerters and those who had received their cards from Germany paid the same amount; that anwaerters were required to pay dues as soon

as they had filed their applications for membership (R. 21, 64, 83). She also testified that invitations to festivities held under the auspices of the German Consulate were sent not only to those who had received their membership cards but also to anwaerters (R. 39, 43).

Miss Illian testified that there was kept in the office of the Consulate a card file of members of the Party and applicants for membership (R. 24, 37, 66). In the early part of 1940 she and another stenographer prepared from this file a list of members of and applicants for membership in the Party. The list bore the legend: "List of Persons who have applied for Passports." Each petitioner's name appeared on the list. (R. 36–37, 40, 42, 66; List, Gov. Ex. 17, Tr. 399.)* Shortly after the list was prepared the card file disappeared. Miss Illian testified that before the file disappeared Vogel told her that the "file cards are going to be destroyed" (R. 40, 42, 67).

In August or September, 1940, at Vogel's direction, Miss Illian sent a form letter signed by Draeger to the persons whose names appeared on the list, including the applicants for membership (R. 45–47, 67–68). This letter read as follows (Gov. Ex. 36, Tr. 400):

> I hereby request you to look me up at the Consulate General as soon as possible for the purpose of discussing a personal matter.

*The names on the list were arranged numerically; Fiswick was No. 449, Mayer, No. 230, and Rudolph, No. 612.

Vogel told Miss Illian to mail these letters in batches of 10 to 15 at a time (R. 69). She heard Vogel tell those who appeared in response to the letter that in registering under the Alien Registration Act they were "not to put the fact in that they were members of the National Socialist Party." He also told her that if he was not in when anyone appeared in response to the letter she was to give them the same instruction. (R. 51, 70–71.)

Item 10 on the Alien Registration Form read as follows (R. 266; see, *supra*, pp. 4–5):

> I am, or have been within the past 5 years, or intend to be engaged in the following activities:
>
> In addition to other information, list memberships or activities in clubs, organizations, or societies * * *.

Item 15 on the form read as follows (R. 266; see, *supra*, p. 5):

> Within the past 5 years I _____
> (HAVE, HAVE NOT)
> been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government.

Each petitioner registered under the Alien Registration Act in December, 1940. Fiswick and

Rudolph, in response to Item 10, stated "None"; Mayer stated "Reichedeutshe Vereingung. New York, N. Y." Each petitioner, in response to Item 15, stated "Have not" (Gov. Exs. 1–F, 1–G, 1–H, R. 265–270).

After some persons had been given instructions not to disclose their membership in the Party in registering, Vogel prepared a second instruction in respect of the information to be given by members in registering. He dictated the wording of it to Miss Illian and told her to give it to members who came in while he was out. (R. 48–50, 51, 72.) This instruction read as follows (Gov. Ex. 37, Tr. 401):

> Under "additional information" insert:
> I am a non-resident member of the National Socialistic German Labor Party in the United States since ----------.
> No activities in the United States.
> (Question 15—have not ----------.)

Vogel also gave Miss Illian a list of names of those who had registered before they received the second instruction (R. 50–53; Gov. Ex. 38, Tr. 402). These persons were to receive a form letter which they were to send to the "State Department" amending their answers to Items 10 and 15 in the Alien Registration Form (R. 52–53). This form letter, addressed to the "United States Department of Justice, Immigration and Natural-

ization Service, Alien Registration Division," read as follows (Gov. Ex. 39, Tr. 402; see R. 53):

> I have previously registered as an alien under the above number on the form provided for that purpose. I assumed from the wording of questions Nos. 10 and 15, that these questions referred to present activities.
>
> However, in order to avoid any misunderstanding I wish to amend my registration so that the same shall show that I am a non-resident member of the National Socialistic German Labor Party since ----------, but have not been actively engaged in any way in said party, or on its behalf, and am not engaged in political activities in this country.[9]

Gauerke, who for some weeks in the fall of 1940 was on duty at the Consulate between 5 p. m. and 10 p. m., testified that during that time groups of men numbering from 10 to 15 called at the Consulate to see Draeger. He subsequently inquired of Vogel whether the reason for these visits was to tell "these Party members coming here at night that they should fill in the questionnaire as an alien * * * [that] I am a member

[9] The record contains amendatory letters by defendants Burchardt and Ulrich (Gov. Exs. 1B and 1D, Tr. 38). There is nothing in the record to indicate that petitioners received the form letter or that any of them filed an amendatory statement.

of the Reichsdeutschevereinigung,[10] and he said yes" (R. 84–86).

Borchers, a Party member, testified that in September, 1940, Vogel told him that "when they went to register they were not to state that they were organized [as] the Nazi Party" (R. 93). There were three others present at this time (R. 95). Vogel also instructed him to turn in his Party membership book; "otherwise he would come in trouble" (R. 94).

There were introduced certain oral and written statements each petitioner made to agents of the F. B. I. in 1943 and 1944. Petitioner Mayer was interrogated by an F. B. I. agent on November 22 and 23, 1943 (R. 105–106). The agent testified that in the interrogation of November 22, 1943, he asked Mayer about his membership in the Nazi Party "in this country" and that Mayer denied that he was a member (R. 113); that when he questioned Mayer the following day, Mayer said that he "might as well tell * * * the story"; that he applied for membership in the Party in early 1936 or early 1937; that in December, 1940, he turned in his membership card to

[10] This was an association of German nationals in the United States who, Gauerke stated, he believed "belonged to * * * the German Labor Front" (R. 86), although petitioner Mayer was told by Vogel to state, if questioned about the organization, that it was a "welfare organization." Mayer also stated that he had never heard of the organization and did not belong to it (*infra*, p. 16).

Vogel and Vogel told him not to list his membership in the Party in registering under the Alien Registration Act, and to state in answer to Item 10 "which pertains to a membership in organizations in this country", that he was a member of the Reichsdeutschevereinigung; that if he were questioned about that organization he was to say that it was a welfare organization; that Mayer stated he had never heard of that organization before and was not a member of it; that Vogel told him to answer Item 15 on the registration form, "Have not"; that he went to the Consulate on 8 or 10 occasions to pay dues; that in September, 1940, he was called to the Consulate, at which time there were present 10 or 15 other persons whom he assumed to be members of the Party, and that on this occasion Draeger asked whether those present desired to return to Germany, the majority, not including Mayer, indicating that they did, and that Draeger told the gathering that "they should continue to be loyal to the Party and to the Fuehrer, or some words to that effect"; that "they could become a member of the Nazi Party in this country even though they became citizens of the United States"; that the reason he had not disclosed his membership when he had been questioned the day before was that Vogel had told him not to disclose his membership (R. 113–120, 130–131). Mayer then signed a statement substantially similar to the verbal state-

ment (R. 119, 141–142, 153; Gov. Ex. 56, R. 272–273).

Petitioner Fiswick was questioned by an F. B. I. agent on April 29, 1944. At the outset of the interrogation the agent told Fiswick that "we wanted him to tell us the truth about his membership in the Nazi Party, and we would appreciate it if he would tell us at the time of that interview." Fiswick first said he was not a member or a prospective member of the Party, that he had so informed an Alien Enemy Hearing Board on January 7, 1944, and agents of the F. B. I. at an earlier interrogation (R. 155–156). Fiswick then stated that he desired to tell the truth and signed a statement in which he said that he had applied for membership in the Party in July or August, 1939; that he had filled out the application at the German Consulate in Vogel's presence; and that he had paid dues at the Consulate office until June, 1941, when that office was closed. In his application for membership he stated that he "recognized Adolf Hitler as the leader of the German Reich and * * * agreed to obey the laws of the German Reich." He also said that in 1940 he went to see Vogel in response to a notice; that Vogel told him and four other applicants that it would not be necessary for them in registering under the Alien Registration Act to state that they were members of the Party; that since he had not yet received his

membership book from Germany, he did not in registering state that he was a member of or affiliated in any way with the Party; that in registering he followed Vogel's instructions; that he had attended various Nazi Party festivals in New York; that in April or May, 1941, he attended a Party meeting at the German Consulate at which Draeger stated that the Consulate "was closing and that war was possibly coming, and that all of the members should obey the laws of the United States and that we should destroy our membership cards", and that he destroyed his membership card upon arriving home after this final meeting. (R. 154, 156, Gov. Ex. 65, R. 273–275.)

Petitioner Rudolph was questioned by an F. B. I. agent on November 17, 1943. The agent asked Rudolph "if he wanted to discuss some matters that he had told the Alien Enemy Hearing Board at the time that he was previously before the Board, which matters we had information about that he had not told the truth". Rudolph said that he had applied for membership in the Nazi Party in March, 1938, had received a dues card, and had paid dues until a month or two prior to Pearl Harbor; that in 1940, at the time of the alien registration, an official of the German Consulate told him at the Consulate that if he was questioned concerning his membership in the Party he was to deny such membership (R. 159–164). In a statement which he signed on the

same date, Rudolph reiterated the foregoing and further stated that he was advised by an official of the German Consulate in New York City to state on his alien registration form that he was not a member of the Nazi Party; that "if anything happened to just deny membership in the party"; that he had received a yellow book at the time he applied for membership, which he later burned; that he knew the "party and the German State to be one and the same." (Gov. Ex. 67, R. 159, 279–280). On September 5, 1944, Rudolph gave the F. B. I. another written statement (R. 159, 163). In this statement Rudolph retracted his earlier statement in so far as he had there said that in registering under the Alien Registration Act he had followed instructions in failing to disclose his Nazi Party affiliation or activities. He also said that he knew his answer to Item 15 was false but that the reason he had failed to make the disclosure was his fear that to do so "would hurt my family and that I would be interned"; that in filling out an alien enemy form on February 25, 1942, he did not disclose his affiliation with the Party for the same reason; that he acted in that manner "all of my own volition without anyone telling me how or why I should do so." He further stated that he had received invitations from the Consulate to some functions given by the Party but had only attended two social affairs, and that he had also

received propaganda material from the German Library of Information (Gov. Ex. 67A, R. 281–282).

The question of the admissibility of one petitioner's statements to the F. B. I. as evidence against the other petitioners was first raised in connection with petitioner Mayer's statements. At the beginning of the interrogation of the F. B. I. agent, petitioner Fiswick's attorney (R. 16) objected to having any statements by Mayer go into evidence against Fiswick (R. 106–107), and after some colloquy (R. 108–110) the trial judge ruled that if Mayer's statements were in the nature of an admission on his part they would be admissible as against him, and that "if the conversation took place after the expiration of the conspiracy, it will be admissible against him and can under no circumstances be used against the balance of the alleged conspirators" (R. 110; see also R. 112, 147). The statements were first admitted only as against Mayer (R. 153), and the same course was followed as to Fiswick and Rudolph with respect to their statements (R. 154, 159). However, at the close of the Government's case the trial judge ruled that each of these statements was admissible against each of the other co-conspirators (R. 165). The defendants excepted (R. 166). The trial judge stated (R. 165):

> Now, in order that there may be no mistake, a question has arisen which I conceive

to be novel, as to whether or not there is a continuing conspiracy without a positive act; I am ruling that the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there * * * is such continuous cooperation. That has been the determination of the Supreme Court where there was an act of commission; I am now extending it to a situation whereby cooperation may be indicated by failure to do some act to indicate a desire to bring to an end the continuing situation effected by the act previously done. Under that ruling, and in order that there may be no further mistake, I shall rule that all the statements which were made by each of the defendants, although they were made after 1940, will be admissible against each of the other alleged co-conspirators."

[11] It may be noted that after this ruling the trial judge, in connection with defendant Nauert, as to whom the jury later returned a verdict of not guilty (R. 5), granted a motion to strike from the evidence as to Nauert all statements made by co-defendants to the F. B. I. subsequent to May 7, 1942, on the ground that Nauert had been taken into custody on that date and had made a full and complete disclosure to the F. B. I. which supplied the deficiencies in his alien registration statement and terminated his connection with the alleged conspiracy; however, he allowed Nauert's statement to be used against him and, in addition, against the other defendants (R. 228–229; see also R. 242, 252).

Each petitioner took the stand in his own defense. The gravamen of Mayer's (R. 166–192) and Fiswick's (R. 214–225) defenses was that Vogel had explained to them that mere applicants for membership in the Nazi Party were not required to disclose that fact in registering. Rudolph's defense, in line with his statement to the F. B. I. on September 5, 1944 (*supra*, p. 19), was that he had never received any instruction from anyone not to disclose his Party connection in registering; that he had never talked to anybody at the Consulate in connection with registration and that nobody at the Consulate had advised him to deny that he was a member of the Party (R. 198–214).

In the course of his charge to the jury the trial judge stated (R. 239–240):

> There have been admitted into evidence certain statements, written statements and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy; and these admissions and statements are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it. I have ruled that this is a continuing conspiracy, and * * * I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of

> proving the conspiracy itself, but simply to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the conspiracy.

The defendants excepted to the portion of the charge "with respect to the admission in evidence of the statements of the defendants and their binding effect upon the other defendants" (R. 249).

Later the jury returned to the court room and the foreman told the judge that they had a question about that part of the charge "where you said something about all of the defendants were bound by the act of one or something, something as a group, and the other said the individuals." In reply the judge stated (R. 253):

> Here is what I said, that the acts or admissions of each of the co-conspirators are admissible as evidence against all of the other co-conspirators provided you find that there was a conspiracy and that they were all in it. Of course, if you find that any particular individual defendant was not in this common agreement that the indictment alleges existed, then he would be immediately out of the situation.

The circuit court of appeals affirmed the judgments of conviction (R. 301, 310), one judge dissenting (R. 301). The majority opinion (R.

290–301) regarded the question of the admissibility of each petitioner's statements against the other petitioners as turning primarily upon whether there was a conspiracy which continued to the filing of the indictment as charged. The majority stated that that was the "problem which presents the real issue" (R. 296). The argument against a continuing conspiracy was that the last overt act which occurred was Mayer's registration on December 23, 1940, long prior to the giving of the statements (R. 298), and that all the proof showed was a concluded conspiracy with a continuing result (R. 296). The majority held, however, that as charged and as proved the scheme did not end with false registration. "The latter was essential but to accomplish the end result the concealment of Nazi membership had to be affirmatively maintained thereafter" (R. 298). The majority pointed out that "the three sets of admissions" were themselves evidence of this. Mayer, as late as November 22, 1943, and Fiswick, on April 29, 1944, denied their Nazi Party membership, and this was some evidence that they were still following the plan and furthering the conspiracy even though they admitted their membership finally. As to Rudolph, the jury could have concluded that he persisted in actively maintaining the conspiracy down to the extent of testifying at the trial that he had never received or followed registration

instructions, and so denying an earlier admission. These denials constituted "some proof of specific overt acts in furtherance of the plan conceived and partially executed in 1940" (R. 299). They were consistent with the charge of a continuing conspiracy from prior to 1940 to the date of the indictment (R. 299–300).

The majority also held that it could not be maintained that the necessary result of the F. B. I. statements and conversations "must be in destruction of the conspiracy." It said that while this might be one conclusion, the jury could also have inferred that Rudolph as late as the trial, Mayer down to November 22, 1943, and Fiswick until April 29, 1944, were still affirmatively aiding the scheme set out in the indictment; that the conversations of Mayer and Fiswick with the F. B. I. and their statements, and Rudolph's statement and his testimony at the trial, must be considered together, and that "When this is done all three groups can be reasonably interpreted to imply deliberate concealment of Nazi Party membership down to the mentioned dates. It is not difficult to accept the so-called confessions as part of the acts which furthered the conspiracy when it is remembered that as to Mayer and Fiswick, their confessions coupled with the immediately preceding denials and as to Rudolph, his trial repudiation of his confession all give some indication at least that there has been a continuing

affirmative fraud on the United States" (R. 300).[12]

The dissenting judge was of the view that if the Government failed to prove that the conspiracy was in continuation on September 5, 1944, the date of the last statement by Rudolph, it was error to permit any of the statements to be received in evidence against any other alleged conspirator, since it was well established "that if the conspiracy had been terminated prior to the date of the confession an admission or a confession by one conspirator, made after termination of the conspiracy, and, therefore, not in furtherance thereof, cannot be received in evidence against any other alleged co-conspirator unless the admission or confession was made in the presence of such other conspirator" (a situation not here involved). On this point the dissenting judge was of the opinion that since there was no proof of any overt act after December 23, 1940, the date Mayer registered, the Government failed to show a subsequent continuation of the conspiracy (R.

[12] On the hypothesis that the conversations with and the statements of petitioners, including Rudolph's testimony, were evidence of the continued functioning of the plan of not disclosing information and of giving false information, the majority held that there was no difficulty with respect to the statute of limitations, since the jury by its verdict obviously believed, as it was entitled to do, that it was dealing with a crime which continued "right into the trial itself" (R. 300–301). Such a rationale is not needed to save the prosecution from the statute of limitations (see footnote 26, *infra*, pp. 41–42).

302). He also found in this connection that there was no proof that either of the petitioners was at the time of registration, or ever had been, anything more than a non-resident member of the Nazi Party; and that since the Government's evidence showed that sometime prior to May, 1941, the German Consul, the *sine qua non* of the conspiracy, undertook to end the period of secrecy by advising all members of the Party to file an amended registration statement disclosing their true status, there was then an abandonment of the conspiracy to keep the Government from finding out who were members of the Nazi Party (R. 302–303).[13]

The dissenting judge was also of the view that the statements of petitioners to the F. B. I. could in no wise have been in furtherance of the conspiracy since they were each made to the F. B. I. "in full revelation, termination, and frustration of a conspiracy whose chief object had been the concealment of the same facts as revealed by the confessions" (R. 302). It cannot "rightly be said that any complicity by either [petitioner] in the conspiracy had continued" beyond the making of the statements. "When these [petitioners] made their confessions to the F. B. I. they necessarily thereby terminated any part in a conspiracy to deprive the Government of the information revealed by such admissions" (R. 304).

[13] As to this, however, see footnote 24, *infra*, p. 40.

The dissenting opinion concluded that it was reversible error to admit "the confessions of the [petitioners] as against any [petitioner] other than the maker since it clearly appears that no confession was made either in the presence of another [petitioner] or in furtherance of the alleged conspiracy" (R. 309).

SUMMARY OF ARGUMENT

I

Since petitioner Fiswick has fully satisfied the sentence imposed on him, the cause is moot as to him and the writ of certiorari should be dismissed as to him. *St. Pierre* v. *United States*, 319 U. S. 41. While in the *St. Pierre* case the Court, in passing, stated that St. Pierre had not "shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied," and if the crime of which Fiswick stands convicted is one involving moral turpitude, he is mandatorily deportable, this should not under the circumstances prevent the case from being moot. The only ground of any substance urged for reversal is one which, if sustained, would result in the remanding of the case for a new trial and thus afford the Government the opportunity to obtain a proper conviction. This, however, Fiswick has prevented by electing to serve his sen-

tence. Obviously, under the provisions of the Fifth Amendment, he could not be retried since, having already served his sentence, he could not be resentenced. The result would be that he would escape deportation in the event of a reversal. Deportation should not be defeated in that fashion. While it may be that a holding that the case is moot might be considered harsh if the other petitioners secure a reversal and are subsequently acquitted, the harshness is the consequence of Fiswick's having chosen to serve his sentence rather than to apply for bail or to secure a stay of execution. Failure to follow the latter course ought not to be permitted to frustrate the deportation process.

II

The only question presented by the petition for a writ of certiorari was that it was reversible error to admit as against each petitioner statements which the other petitioners made to the F. B. I. in 1943 and 1944. The trial court and the majority of the court below ruled that these statements were properly admitted, the former on the theory that they were made during the course of a conspiracy which endured beyond the alien registration period in 1940 and were evidence of acts or a course of conduct which could be in furtherance of the conspiracy, and the latter on the theory that the statements themselves could be considered in furtherance of a continuing

conspiracy. The dissenting judge, on the other hand, concluded that the conspiracy did not continue beyond the registration period, and he further held that the statements could have been in no sense in furtherance of the conspiracy in that each was made to the F. B. I. in full revelation, termination, and frustration of a conspiracy the chief object of which had been the concealment of the same facts revealed by the statements. Petitioners argue that the conspiracy came to an end with the registration period and, hence, that none of the statements was admissible against anyone but its maker.

We do not consider the question of continuing conspiracy, so much discussed in the opinions below, because even if the conspiracy did continue after the registration period, we agree with the dissenting judge that the statements were not admissible against others than their makers, for the reason that they were in full revelation, termination, and frustration of the conspiracy. However, in our view, the error should be considered harmless under the test recently laid down in *Kotteakos* v. *United States,* Nos. 457 and 458, last Term, decided June 10, 1946, and consequently that it does not constitute ground for reversal.

A. When questioned by the F. B. I., both Mayer and Fiswick initially denied their connection with the Nazi Party. Almost immediately thereafter they made admissions to the F. B. I.

from which the jury could conclude that they were parties to a conspiracy to conceal their Party connections when registering in 1940. When Rudolph was interrogated by the F. B. I, he immediately admitted his part in the conspiracy, and it was not until nearly a year later that he retracted his admission in part. Revelatory of the part he had played in the scheme, each petitioner's statements constituted a termination by him of any further participation in the conspiracy and they were but narration of past events, utilizable against him as an admission against interest, but under well settled principles not against other conspirators.

The significance attributed by the majority below to Mayer's and Fiswick's preliminary denials and to Rudolph's retractions is, we think, without bearing on the question whether the statements of each were in destruction of a further participation in the conspiracy. The preliminary denials were but the natural expressions of those who did not want to reveal their crimes when confronted by Government investigators. Rudolph's retractions did not obliterate his earlier revelation. They, like Mayer's and Fiswick's trial explanations, merely presented matter which the jury was required to consider in determining whether or not the truth lay in the statements.

B. Appraising the error in the light of the criteria applied in the *Kotteakos* case to the problem of when error is harmful, we do not believe

that there is in this case any basis for real doubt that the error did not substantially influence the verdict. The dissenting judge, while holding that reversible error resulted, did not indicate in what respect petitioners were prejudiced. The only prejudice which petitioners articulate is either without foundation or is not real prejudice.

The record shows that the purpose of the introduction of the statements was to show the participation of each petitioner in the conspiracy. It is apparent from the statements themselves that each disclosed no more than the participation of its maker in the conspiracy. The statements were in substance identical. Since each petitioner admitted his own complicity, there was obviously no occasion for the jury to resort to the similar admissions made by the others. Furthermore, nowhere in the statements of any petitioner is there a single reference to any other defendant. Under these circumstances, there was nothing in the statements of one petitioner which the jury might reasonably be said to have utilized to establish the participation in the conspiracy of another petitioner. In analogous situations appellate tribunals have declined to reverse convictions.

III

In their brief on the merits petitioners have raised questions which were not presented by the petition for a writ of certiorari. We think that

under Rule 38 of this Court these additional questions should not be considered. While we discuss them, none of them, in our judgment, possesses any merit, and several, at least, are of a character which would not warrant further review on certiorari.

ARGUMENT

I

THE CAUSE IS MOOT AS TO PETITIONER FISWICK AND, THEREFORE, THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS TO HIM

Because of his conviction in this case Fiswick was sentenced to imprisonment for 18 months (R. 6). No fine was imposed. So far as appears from the record Fiswick, unlike Mayer and Rudolph, made no application for bail or took any other step to stay the execution of his sentence pending appellate proceedings. He apparently elected to commence service of his sentence immediately (see R. 6; Rule 5 of the Criminal Appeals Rules of May 7, 1934). Petitioners' brief contains the statement that Fiswick has served his sentence (Br. 5), and this is confirmed by the records of the Bureau of Prisons.[14] Under these circumstances we believe that the cause is

[14] The Bureau has advised us that its records show that Fiswick completed service of the full term of his sentence on June 19, 1946 (after the granting of certiorari), and that he was unconditionally released on that date. The United States Attorney has informed us that Mayer and Rudolph are still out on bail.

moot as to Fiswick and, therefore, that the writ of certiorari should be dismissed as to him. *St. Pierre* v. *United States*, 319 U. S. 41. As this Court said in that case (pp. 42–43):

> * * * the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. * * * The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or to restore to petitioner the penalty of the term of imprisonment which he has served.

The Court added (p. 43) that the moral stigma resulting from St. Pierre's conviction did not prevent the case from being moot.

However, the Court, in passing, stated that St. Pierre had not "shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied" (p. 43). The only future penalty or disability to which Fiswick alludes is that if his conviction is sustained he is "still subject to deportation if this conviction is on grounds involving moral turpitude" (Br. 5). It is true, as Fiswick indicates, that if his conviction in this case was for a crime involving moral

turpitude he is subject to deportation under the provision of 8 U. S. C. 155 that "any alien who * * * is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, * * * shall, upon the warrant of the Attorney General, be taken into custody and deported."[15] If it be assumed *arguendo* that a conspiracy such as is here involved, to defraud the Government by impeding it in one of its lawful functions, is a crime involving moral turpitude,[16] Congress has imposed as incident to Fiswick's conviction not only the penalty of imprisonment or fine, or both, but has prescribed in addition that he shall be deported. The only ground of any substance which he urges for a reversal is one which, if sustained, would result in the remanding of his case for a new trial.[17] Normally, in such a case, the Government would be in a position to proceed with the prose-

[15] The record indicates that Fiswick last entered the United States on June 28, 1937 (R. 265; see also R. 220). As the evidence shows, *supra*, the conspiracy was formed and was in process of execution shortly before the registration of petitioners under the Alien Registration Act in the latter part of 1940, and, hence, within five years of Fiswick's last entry.

[16] Compare *U. S. ex rel. Berlandi* v. *Reimer*, 30 F. Supp. 767 (S. D. N. Y.), affirmed, 113 F. 2d 429 (C. C. A. 2); *Guarneri* v. *Kessler*, 98 F. 2d 580 (C. C. A. 5).

[17] This ground is that it was prejudicial error to admit statements by Mayer and Rudolph to the F. B. I. against him. This is discussed in Point II, *infra*, pp. 37–54.

cution until it obtained a conviction free from reversible error. However, Fiswick, by choosing to serve his sentence, has prevented this Court from affording the Government the opportunity, which it otherwise would have had, of attempting to secure a proper conviction in the event of a reversal. Obviously, under the provisions of the Fifth Amendment, Fiswick could not be retried since, having already served his sentence, he could not be resentenced. Cf. *In re Bradley*, 318 U. S. 50, 52; *Miller* v. *Aderhold*, 288 U. S. 206; *Ex parte United States*, 242 U. S. 27; *Bergdoll* v. *United States*, 279 Fed. 404, 405–406 (C. C. A. 3), certiorari denied, 259 U. S. 585.[18] The result would be that if his conviction were reversed he could not be reconvicted even if guilty, and he would thereby escape deportation. By electing to serve his sentence he would thus have thwarted the Congressional policy of deporting aliens guilty of crimes involving moral turpitude. The Government ought not to be prevented from executing that policy because Fiswick elected to serve his sentence.[19]

It may be that a holding that the case is moot might be considered harsh if this Court reversed

[18] In the *St. Pierre* case itself this Court pointed out that "reversal of the judgment below cannot operate to undo what has been done * * *" (p. 42).

[19] Where a reversal would result not in a new trial but in a termination of the prosecution, the situation might be different. There the Congressional policy would not be thwarted, because the prosecution should never have been brought.

the convictions of the other petitioners and they are acquitted in a new trial. But if there is harshness, it is plainly the consequence of Fiswick's having chosen to serve his sentence rather than to apply for bail or to secure a stay of execution. His failure to follow a course which would have obviated a possible harsh result ought not in all fairness be permitted to frustrate the deportation process.[20] Clearly, if one of several defendants fails to appeal and the others obtain a reversal and are subsequently acquitted, the former may nevertheless be punished and deported. The situations are analogous.

II

WHILE IT WAS ERROR TO PERMIT THE JURY TO CONSIDER EACH PETITIONER'S STATEMENTS TO THE F. B. I. AS EVIDENCE AGAINST THE OTHER PETITIONERS, THE ERROR WAS NOT HARMFUL SINCE IT CANNOT REASONABLY BE SAID THAT IT SUBSTANTIALLY INFLUENCED THE JURY'S VERDICT

The only question presented by the petition for a writ of certiorari was that it was error to admit as against each petitioner statements which were made by the others to the F. B. I. Petitioners argue this question in their brief on the merits,

[20] In the event of a reversal as to the other two petitioners and their subsequent acquittal, it may be that Fiswick will be in a position to secure a pardon. In that event he would not be deportable. 8 U. S. C. 155, *supra*, provides that its provisions "respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned."

as well as other questions which were not raised by the petition for a writ of certiorari. Under these circumstances we address ourselves first to the question presented by the petition for a writ of certiorari, and deal briefly with the other questions, *infra*, pp. 54–60).[21]

Reserving to the jury the necessary factual determinations, the trial judge ruled that the written statements and verbal admissions of each petitioner to the F. B. I. were properly evidential not only as against him,[22] but against the other two petitioners, for the following reasons: the conspiracy continued until the date of the indictment; the admissions and statements were made during the continuance of that conspiracy by a then participant; they involved statements and admissions of activities done by a conspirator in furtherance of the object of the conspiracy; they were not admitted for the purpose of proving the conspiracy itself but simply to prove acts and a course of conduct which would be chargeable to the other conspirators because done in furtherance of the conspiracy's object (see, *supra*, pp. 22–23). The majority below sustained that rul-

[21] While we believe that the case is moot as to petitioner Fiswick for the reasons stated at *supra*, pp. 33–37, we nevertheless will deal with his case on the merits.

[22] We do not understand petitioners to question that each petitioner's statements were competent evidence against him, if there was proof *aliunde* of a conspiracy (see Br. 32). We submit that there was such proof. See footnote 30, *infra*, p. 49.

ing, directing its argument principally to the propositions that, as alleged, there was a continuing conspiracy affirmatively to maintain concealment of Nazi membership after the false registration, and that the three sets of admissions were part of the pattern of continued affirmative concealment, since each petitioner, years after the false registration, persisted in actively maintaining the conspiracy, Mayer and Fiswick as late as November 22, 1943, and April 29, 1944, respectively, denying initially in their interviews with the F. B. I. that they were members of the Nazi Party, and Rudolph as late as the trial itself insisting that he had not acted pursuant to instructions in registering falsely, and thus retracting an earlier admission to the F. B. I. Because of these considerations, to which the jury could give weight as supporting the idea of a continuing conspiracy, the jury was not required, the majority thought, to conclude that the petitioners' confessions to the F. B. I. were in destruction of the conspiracy.

The dissenting judge attacked the idea that the conspiracy ran beyond December 23, 1940, the date on which Mayer registered,[23] pointed to the German Consul's termination of the period of secrecy sometime prior to May, 1941, by advising members of the Party to file an amended registration certificate that they were non-resident members of the Party without activity in this

[23] He was the last of the convicted defendants to register.

country,[24] and held, further, that petitioners' statements to the F. B. I. could in no sense have been in furtherance of the conspiracy in that each was made to the F. B. I. in full revelation, termination, and frustration of a conspiracy whose chief object had been the concealment of the same facts revealed by the confessions.

In this Court petitioners' principal argument on this phase of the case is that the conspiracy did not survive the filing of the false registration statements in December, 1940, and hence that none of the statements of petitioners to the F. B. I., as well as similar statements by other defendants,[25] was admissible against anyone but the maker (Br. 26–38).

We do not think it advances the resolution of the question presented to give consideration to the problem much mooted below whether the con-

[24] We do not think that there is any basis for the dissenting judge's view. The indictment was framed on the theory that there was an active section of the Nazi Party in the United States, and the evidence supported this theory. It was, therefore, obviously misleading for those who were active members of the Party in the United States to state that they were non-resident members of a foreign party without activities in this country.

[25] The statements of the other defendants are not contained in the printed record but appear in the typewritten transcript. We are concerned here, however, only with petitioners' statements. The trial court instructed the jury that the statements of one defendant could be considered against another defendant only if it found that both were members of the conspiracy (R. 239, 253). The only defendants convicted were the three petitioners.

spiracy endured beyond the filing of the false registration statements in December, 1940,[28] because, in line with the dissenting judge, we cannot believe that even if it did, the written statements and verbal admissions of the petitioners could be considered in furtherance of the object of a continuing conspiracy. Rather, to use the language of the dissenting judge, they were "each made to the F. B. I. in full revelation, termination, and frustration of a conspiracy whose chief

[28] While the discussion in the opinions below as to whether the conspiracy continued beyond the filing of the false registration statements, was occasioned primarily by the problem whether petitioners' statements to the F. B. I. were made during the existence of the conspiracy, the majority below seemed also to think that it was necessary to hold that the conspiracy survived the registration period in order to save the prosecution from the statute of limitations (R. 300–301). The last utilizable overt act alleged to have been committed pursuant to the conspiracy, i. e., Mayer's registration, occurred on December 23, 1940 (*supra*, p. 8). The majority below undoubtedly had in mind the three-year period provided by 18 U. S. C. 582, the general statute of limitations as to criminal offenses, which period would have expired on December 23, 1943; the indictment was not filed until ~~December~~ September 13, 1944. However, by Section 1 of the Act of August 24, 1942, c. 555, 56 Stat. 747, "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate." On July 1, 1944 (c. 358, 58 Stat. 649, 667, 18 U. S. C., Supp. V, 590a) this section was amended in respect of the cases specified by further suspending the running of the statute of limitations until three years after the termi-

object had been the concealment of the same facts as revealed by the confessions." (R. 302.) We consequently are of the opinion that even under the theory of a continuing conspiracy utilized by the majority below, we cannot support the admission of the statements as evidence against those who did not make them.[27] However, it is our opinion that the error should be considered harmless under the test recently laid down by this Court in *Kotteakos* v. *United States*, Nos. 457 and 458, last Term, decided June 10, 1946, and consequently does not constitute ground for the reversal of the judgments of conviction.

A. *The admission of each petitioner's statements against the other petitioners was error.*—If the theory of the majority below be accepted, the

---

nation of hostilities in the existing war as proclaimed by the President or by a concurrent resolution of the two houses of Congress. It is evident from the committee reports relating to the 1942 Act that that Act was intended to embrace offenses covered by 18 U. S. C. 582, the general three-year statute of limitations as to criminal offenses. See H. Rep. 2051 and S. Rep. 1544, 77th Cong., 2d sess. See, also, *Miller* v. *United States*, 24 F. 2d 353, 360–361 (C. C. A. 2), certiorari denied, 276 U. S. 638; compare *United States* v. *Noveck*, 271 U. S. 201, 204. It is consequently clear that the prosecution was not out of time even if the conspiracy did not endure beyond the registration period.

[27] Of course, if, as petitioners contend, the conspiracy ended with the filing of the false registration forms, the conspiracy was at an end when the statements were made, and hence they were not admissible against other alleged co-conspirators under the well-settled principle enunciated by this Court in *Logan* v. *United States*, 144 U. S. 263, 308–309, and *Brown* v. *United States*, 150 U. S. 93, 98–99.

object of the conspiracy was not only that petitioners should connive with Draeger and Vogel that they should register falsely, but that they should persist affirmatively thereafter in their deceit and concealment from the Government. In the interrogative process, several years after the registration, both Mayer and Fiswick denied their connection with the Nazi Party and hence asserted in effect that they did not register falsely. Almost immediately, however, they made admissions, written and oral (Fiswick in the same interview and Mayer the next morning), from which the jury could conclude, particularly when considered in the light of the background evidence, that they were parties to a conspiracy with Party leaders to conceal their Party membership or affiliation. When interrogated by the F. B. I. Rudolph immediately admitted his part in the conspiracy by asserting that he had failed to disclose his Party membership when registering upon instruction from a Consulate official. It was not until nearly a year later that Rudolph, in another statement to the F. B. I., retracted his admission that he acted pursuant to instructions when registering falsely.

If continued affirmative maintenance of the plot to deceive was the conspirators' objective, as the majority below thought, then, it would seem to us, that when each petitioner revealed to the

Government information which no longer left it deluded as to him, that petitioner was not furthering the plot but, so far as he was concerned, was terminating, or frustrating, it. He was withdrawing from the plot; he was no longer a partner in crime and hence had ceased to be a conspirator. Therefore, on the agency principle, upon which conspiratorial responsibility is predicated, what he disclosed could not be used against his erstwhile fellow-conspirators, nor could their similar statements for the same reason properly affect him. Revelatory of the part he had played in the scheme, his statements were but narration of past events, utilizable, of course, against him as an admission against interest, but not against those as to whom he had severed the tie of association in crime.

These principles are given expression in several groups of cases: those which hold that the acts or declarations of a conspirator in furtherance of an existing conspiracy bind his fellow conspirators (*Pinkerton* v. *United States,* No. 719, last Term, decided June 10, 1946, slip opinion pp. 5–6; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253–254; *Delaney* v. *United States,* 263 U. S. 586, 590; *Wiborg* v. *United States,* 163 U. S. 632, 657–658; *Clune* v. *United States,* 159 U. S. 590, 593; *Bannon and Mulkey* v. *United States,* 156 U. S. 464, 468–469); those which declare that after a conspiracy is ended a conspirator's later

acts or declarations cannot be used against his fellows (*Logan* v. *United States,* 144 U. S. 263, 308–309; *Brown* v. *United States,* 150 U. S. 93, 98–99); and, more immediately, those which rule that a conspirator's statements in the nature of a confession to police authorities are not competent evidence against his co-conspirators (*Gambino* v. *United States,* 108 F. 2d 140, 142–143 (C. C. A. 3); *United States* v. *Corso,* 100 F. 2d 604, 605 (C. C. A. 7); *United States* v. *Lonardo,* 67 F. 2d 883 (C. C. A. 2); *Dowdy* v. *United States,* 46 F. 2d 417, 425 (C. C. A. 4); *Van Dam* v. *United States,* 23 F. 2d 235, 238 (C. C. A. 6); *Hauger* v. *United States,* 173 Fed. 54, 57–58 (C. C. A. 4); *Sorenson* v. *United States,* 143 Fed. 820, 821 (C. C. A. 8)).

The majority below gave to Mayer's and Fiswick's preliminary denials to the F. B. I. that they were connected with the Nazi Party, and to Rudolph's statement and testimony at the trial retracting his earlier statement to the F. B. I. that he falsely registered pursuant to instructions from a Consulate official, a significance which, in our opinion, is without bearing on the question whether the statement of each petitioner was in destruction of his further participation in the conspiracy. Mayer's and Fiswick's denials would seem to be of no significance. They were followed either immediately or almost immediately by an expression of desire to tell the

agents the full truth and by a complete revelation by each of what he had done. They were but the natural expressions of those who did not want to reveal their crimes when confronted by Government investigators. The later statement of Rudolph to the F. B. I. that he lied when he told the agents earlier that he failed to disclose his Party connection pursuant to the direction of a Consulate officer does not obliterate the fact that he did make a revelation of his participation in the plot. It, as well as his retraction on the stand, like the explanations of Mayer and Fiswick when they testified, merely presented matter which the jury was required to weigh in determining whether or not the truth lay in the statements in question.[28]

B. *The error was harmless.*—The question which then arises is whether the judgments of conviction must be reversed because the error of the trial court in instructing the jury in effect that the statements of each petitioner were properly evidential against the other petitioners constituted reversible error.

Under the "harmless error" statute, Section 269 of the Judicial Code, as amended (28 U. S. C.

[28] The same thing, of course, is true of several explanatory letters of Fiswick to the United States Attorney at Trenton, New Jersey, which appear in the record at R. 275–279. They were apparently introduced to make the evidential picture complete (R. 154); they were exculpatory in nature and hence could not have been prejudicial to Fiswick.

391, *supra*, pp. 5–6), an appellate court may not reverse a judgment of conviction for errors "which do not affect the substantial rights of the parties." Construing that statute in *Kotteakos* v. *United States* (Nos. 457 and 458, last Term, decided June 10, 1946), a criminal case in which petitioners had been convicted by a jury, this Court laid down the following test for determining whether error should result in reversal (slip opinion, pp. 10–11):

> If when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * *. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Appraising the error in the light of these criteria, we do not believe that there is any basis for real doubt that the error did not substantially

influence the verdict. While holding that reversible error resulted (R. 309), the dissenting judge does not indicate in what respect the admission of the statements of one petitioner against the other two prejudiced the latter. It is evident from his opinion that he does not deny that each statement was properly admitted against the maker (see R. 302, 307, 308, 309). Petitioners contend that the statements were highly prejudicial to the rights of the defendants who did not make them and who could not be bound by them (Br. 33). But the only prejudice which they articulate is that the trial court permitted the statements, taking them together, to be considered by the jury as proof of the existence of the conspiracy and of its continuation down to the date of the filing of the indictment (Br. 34), and that "under the ruling made by the Court, who can say that the jury did not consider them in its search for proof of the existence of the conspiracy charged?" (Br. 33).

However, in the instruction in question (*supra*, pp. 22–23) the trial judge specifically told the jury that "these admissions and statements were not allowed for the purpose of proving the conspiracy itself," but "simply to prove acts and course of conduct which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the

conspiracy".[29] It is thus evident that the trial judge forbade the jury to use the statements as proof of the conspiracy.[30]

Assuming, as petitioners claim, that the jury was permitted to utilize the statements as showing that the conspiracy endured beyond the registration period, although it is not at all clear from

---

[29] He had, at the beginning of the instruction, stated that "There have been admitted into evidence certain statements, written statements and verbal admissions made by conspirators, of activities done in furtherance of the object of the conspiracy."

[30] So far as the maker of the statements was concerned, the trial judge could have permitted the utilization against him of his statements for any proper evidential purpose since there was independent proof of the *corpus delicti* (the conspiracy). See footnote 32, p. 52, *infra*. It is well settled in such circumstances that the admissions of a defendant may be considered in connection with the independent proof to establish the defendant's guilt beyond a reasonable doubt. *United States* v. *Di Orio*, 150 F. 2d 938 (C. C. A. 3), certiorari denied, 326 U. S. 771; see *Jordan* v. *United States*, 60 F. 2d 4, 5 (C. C. A. 4), certiorari denied, 287 U. S. 633; see also *Evans* v. *United States*, 122 F. 2d 461, 465 (C. C. A. 10), certiorari denied, 314 U. S. 698; *Ryan* v. *United States*, 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Forte* v. *United States*, 94 F. 2d 236, 240 (App. D. C.).

If the statements had been properly admissible against the other conspirators, as the trial judge thought they were, the statements would have been competent evidence for any relevant purpose against those conspirators if there was proof *aliunde* the statements that they were members of the conspiracy. *Glasser* v. *United States*, 315 U. S. 60, 74–75; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249. That there was such proof in this case cannot be doubted. It is found in each petitioner's statements themselves as well as in the independent proof used to establish the *corpus delicti*.

the instruction in question that this was the case, we are unable to perceive that this in and of itself could have prejudiced the petitioners. Whether the conspiracy continued down to the time when the statements were made was important only in relation to the question whether each petitioner's statements could be used against the others.[31] If any prejudice resulted, it obviously arose from that factor alone. Moreover, petitioners themselves state that there are no "admissions in [the statements] of overt acts by the defendants making them, after December, 1940" (Br. 33), when the registration period ended.

The real purpose for the introduction of the statements, as the record indicates, was to show the participation of each petitioner in the conspiracy. The evidential picture before any of the statements were admitted was this: petitioners' names appeared on a list identified by Vogel's secretary, Miss Illian, as a list of the names of the members and prospective members of the Party. In the fall of 1940 letters were sent to the persons on the list directing them to call on Draeger, the local Party leader. A number of such persons appeared and they were told

[31] As we have indicated (footnote 26, pp. 41–42, *supra*), whether the conspiracy continued after the filing of the false registration statements has no bearing in respect of the statute of limitations.

either by Draeger or Vogel that in registering under the Alien Registration Act they should conceal their Party connections. Each petitioner, in registering under the Act, failed to disclose any party connection (*supra*, pp. 11–15). But there was no direct showing that petitioners were among those who had received the instructions. Of the witnesses called by the Government, Miss Illian was in the best position to know this. However, she could not identify Fiswick and another defendant whom she was specifically asked to identify (R. 72–73), and it is probably the fact that she did not know any of the defendants. Manifestly, it was important for the Government, as the prosecutor recognized (R. 48), to bring into the case against petitioners evidence of a character that might better convince the jury that when each failed to reveal his Party connection in registering he had done so upon Party instructions, and, hence, that he was a member of the conspiracy. This was the state of the record when the question first arose, in connection with Mayer, as to the admissibility of the statements of any of the defendants to the F. B. I. After some colloquy (R. 106–112), the trial judge ruled that Mayer's statements were admissible against him because he concluded that there was independent evidence of the *corpus delicti*—the conspiracy. The trial judge stated, however, that while he thought that there was independent evidence of the conspiracy, the question of participation therein "by individual defendants may be

the subject of further proof" (R. 112).[32] Consequently, it is clear that the statements were introduced merely to establish the participation of each maker in the conspiracy.

Moreover, it is apparent from the statements themselves that each disclosed no more than the participation of its maker in the conspiracy. The statements were in substance identical. Each petitioner in his statements admitted his connection with the Nazi Party and that, in failing to disclose such connection in registering, he had acted pursuant to instructions given by Vogel or some official of the German Consulate (*supra*, pp. 15–19).[33]

---

[32] Present counsel for petitioners indicated that he did not disagree with the trial judge's statement of the law, but only with its application (R. 112). He was correct in his concessions that the statements could be used against their maker if there was independent proof of the *corpus delicti* (cf. cases cited in footnote 30, *supra*, p. 49), and that proof of the identity of a perpetrator of a crime is not part of the *corpus delicti*. Cf. *George* v. *United States*, 125 F. 2d 559, 563 (App. D. C.); *Anderson* v. *United States*, 124 F. 2d 58, 66 (C. C. A. 6), reversed on other grounds, 318 U. S. 350; *Ryan* v. *United States*, 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635. Here, there was independent proof not only of the unlawful combination but also of petitioners' participation therein in the form of the list of members and prospective members on which petitioners' names appeared, through testimony by the Government witnesses that Draeger and Vogel had instructed such persons to conceal their connection with the Nazi Party, and in that petitioners did not state any connection with the Party in registering as aliens.

[33] The jury was justified in inferring that this official was, in the light of the other evidence, either Draeger or Vogel.

Since each petitioner admitted his own complicity, there was obviously no occasion for the jury to resort to the similar admissions made by the others. Furthermore, nowhere in the statements of any one petitioner is there a single reference to any other defendant. Under these circumstances, there was nothing in the statements of one petitioner which the jury might reasonably be said to have utilized to establish the participation in the conspiracy of another petitioner. In analogous situations appellate tribunals have declined to reverse convictions. See *United States* v. *Hannon*, 105 F. 2d 390, 391 (C. C. A. 3); *Beard* v. *United States*, 82 F. 2d 837, 842 (App. D. C.), certiorari denied, 298 U. S. 655; *State* v. *Smith*, 33 Nev. 438, 459 (1910); see also *People* v. *Lorraine*, 90 Cal. App. 317, 334 (1928).

In the *Hannon* case, the prosecution showed that when Thomas Hannon, one of the conspirators, was arrested, he said, "Who squawked?" The court said that "the testimony was admissible as to Thomas Hannon and that it could not have affected the rights of any one of the other appellants for the remark implicated Thomas Hannon only." In *Beard* v. *United States*, appellants claimed that it was error to admit against them declarations of other conspirators made after the latter were arrested. It was said that "the declarations, except against the persons making them, were of no importance. There is nothing in them

which connects any other or others of appellants with the alleged conspiracy." In *State* v. *Smith*, the prosecution introduced a statement made by one of the conspirators after his arrest implicating a conspirator other than Smith, the conspirator on trial. Considering the error in the light of the analogous Nevada "harmless error" statute, it was held that the admission of the statement could not have substantially prejudiced Smith since he was not mentioned in the statement.[34]

We submit that under the circumstances of this case the fact that the jury was erroneously permitted to consider statements of one petitioner against the others was harmless since, under the test enunciated by this Court in the *Kotteakos* case, *supra*, it cannot reasonably be said that the error substantially influenced the jury's verdict.

III

QUESTIONS NOW URGED BY PETITIONERS BUT NOT PRESENTED BY THEIR PETITION FOR CERTIORARI

The only question which was presented by the petition for certiorari was whether it was reversible error for the trial judge to permit the jury to use the statements of one petitioner against the others. In their brief on the merits

[34] In each of the cases cited at p. 45, *supra*, holding that a conspirator's confession to the authorities is incompetent evidence against his fellow conspirators, the confession implicated another conspirator.

petitioners have raised additional questions. Rule 38 of this Court provides that "Only questions specifically brought forward by the petition for writ of certiorari will be considered." See *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 177–178; *National Licorice Company* v. *Labor Board*, 309 U. S. 350, 357. While we discuss the additional questions, none of them, we think, possesses any merit, and several, at least, are of a character which would not warrant further review on certiorari.

A. Petitioners *contend* (Br. 21–25) that "there is an utter failure of proof of any conspiracy." They seem to argue that there could be no proof of any conspiracy between Draeger and Vogel because the relationship which existed between them was that of master and servant and that Vogel simply carried out instructions given to him by Draeger; that even assuming that each defendant intended to register falsely, the evidence presented only the picture of each one coming to the Consulate on his own initiative to secure information as to how he should register; and that there is no proof of the purpose Draeger and Vogel had in mind with respect to the instructions which they issued to registrants.

Of course, the fact that Vogel may have been a subordinate of Draeger would not preclude a conspiracy between them, provided the necessary elements were present. *Hyde* v. *United States*,

225 U. S. 347, 368.[35] Viewing in the light most favorable to the Government the evidence summarized in the Statement, *supra* (*Glasser* v. *United States*, 315 U. S. 60, 80), there can be no doubt that the jury was warranted in concluding that Draeger and Vogel planned that Party adherents should conceal their Party connection when registering under the Alien Registration Act; that pursuant to this plan Draeger, the leader of the Party in New York City, issued directions to its adherents to appear at the Party headquarters so that they could instruct them to conceal their Party connection in registering; and that, in complete obedience to the leadership principle of the Party, petitioners did appear at the Party headquarters, did receive instructions, and did register as directed, under circumstances which make it clear that they became parties to the plan and knew that they were registering falsely.

Furthermore, this Court has held that where, as here, the probative sufficiency of the evidence has the support of the district court (in which is included the verdict of the jury) and of the circuit court of appeals,[36] it will not ordinarily reexamine the question. *United States* v. *Johnson*, 319 U. S. 503, 518. There is nothing in this

[35] The jury was instructed to this effect (R. 239).

[36] See the majority opinion (R. 301). The dissenting judge did not question the sufficiency of the evidence to establish a conspiracy.

case, we submit, to warrant a departure from this rule.

B. Petitioners also contend (Br. 39–43) that there was no proof that they intentionally falsified when they filed their alien registration forms. They assert that the form, particularly when it is considered in the light of the accompanying instructions that were issued to registrants, did not make it clear that a registrant was required to disclose his connection with the Nazi Party in this country where, as in the case of these petitioners, he was merely an applicant for membership. Aside from the fact that there are decisions to the effect that mere applicants for membership in the Party were required to disclose that fact in registering,[37] petitioners' argument is in disregard of the theory upon which this case was presented to the jury. In his charge to the jury the trial judge stated (R. 241):

> There was evidence on the part of the defendants of a difference in so-called membership, which you have the right to consider in weighing the intent of these individuals—the reasons animating them which might modify their intent. There was, for instance, the alleged application for membership, as distinguished from the membership. Whether or not that was

[37] *United States* v. *Ausmeier*, 152 F. 2d 349, 355–356 (C. C. A. 2); *United States* v. *Dawe*, 149 F. 2d 491 (C. C. A. 2); *United States* v. *Koeniger*, 149 F. 2d 492 (C. C. A. 2), certiorari denied, 326 U. S. 725.

> simply a front or whether it was an actuality is for you to determine, and to your finding you will give such weight as you think it merits.

There was nothing in the charge which advised the jury that they, nevertheless, could convict even though a defendant was merely an applicant for membership on the theory that the form required the disclosure of such a connection with the Party. It is evident, therefore, that the jury must have concluded, under the evidence, that there was no real differentiation between applicants and members. The evidence clearly justified that conclusion.[38]

C. In Point IV of their brief, the heading of which (Br. 43) indicates that it is, like Point II (Br. 26), devoted to the question of the admissibility of each petitioner's F. B. I. statements against the other two, petitioners quote at length

[38] As appears from the Statement, pp. 10–11, *supra*, applicants for membership began to pay dues immediately upon filing their applications, and the dues were the same as for full members; they were, like full members, invited to functions by Draeger, the Party leader; and they were, along with full members, directed to appear at Party headquarters, and while there, were given instructions as to how to register. Furthermore, when Mayer and Fiswick were first interrogated by the F. B. I. about membership they first denied membership and then stated that they wanted to tell the truth. Each then said that he was an applicant for membership. We think the jury was entitled to infer from this that these petitioners never thought that there was any real distinction between applicants and full members.

(Br. 45–48) from that portion of the dissenting opinion below which deals with the question whether the trial judge in his instructions to the jury, used language which might be deemed to have taken from the jury the determination of the issue whether there was a conspiracy, and thus invaded the jury's province (see R. 305–308). The point is fully discussed in the majority opinion below and demonstrated to be without merit (R. 296–298). We, therefore feel that extended comment is unnecessary. We do not believe that there can be any doubt, from the instructions involved and from the charge as a whole, that the jury clearly understood that it was its function to decide whether a conspiracy existed; the dissenting judge was, we think, unduly concerned with nicety of language.

D. Finally, petitioners assert (Br. 49–51) that the trial judge refused certain requests for proper instructions, the subject matter of which was not sufficiently covered in his charge, but they make no endeavor to support their assertion by any analysis of the charge. It seems to us that in these circumstances it is hardly incumbent upon this Court to give consideration to the point. However, it may be observed that all of the refused requested instructions quoted by petitioners related either to the question of the defendants' good faith in registering or to the question of

their participation in the conspiracy. These matters were, we submit, adequately dealt with in the charge (see R. 237–239, 240, 241–242).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be dismissed as to petitioner Fiswick, and that the judgment below should be affirmed as to petitioners Mayer and Rudolph.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

OCTOBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1946.

Ferdinand Fiswick, Jacob F. Mayer and Fritz Gustav Rudolph, Petitioners,
v.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 9, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

The Alien Registration Act of 1940, 54 Stat. 670, 8 U. S. C. § 451 *et seq.*, required aliens, with certain exceptions, to register pursuant to regulations of the Commissioner of Immigration and Naturalization.[1] Among the disclosures required was whether during the preceding five years the alien had been "affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government."[2]

Petitioners are German nationals who registered under the Act, the last of the three, Mayer, registering on December 23, 1940. Each stated when he registered that he was not affiliated with or active in such an organization. Each failed to disclose in answer to another question pertaining to "memberships or activities in clubs, organizations, or societies" that he was in any way connected with the Nazi party. They were indicted in 1944 with 28 others for conspiring to defraud the United States in the exercise of its governmental functions (see *Curley* v. *United States*, 130 Fed. 1, 4) in violation of § 37 of the Criminal Code, 18 U. S. C. § 88.

[1] See 5 Fed. Reg. 2836 for the regulations.

[2] Regulations, *supra*, note 1, § 29.4 (l) (15).

The indictment charges that petitioners continuously between September 1, 1939, and the date the indictment was returned, September 13, 1944, conspired with each other and with Draeger, the German consul in New York City and leader of the Nazi party in this country, with Draeger's secretary, Vogel, and with other representatives of the Third Reich, to defraud the United States by concealing and misrepresenting their membership in the Nazi party. It charges that since 1933 the Nazi party was devoted to furthering the political activities and policy of the German Reich in this country, that each petitioner during the five years prior to his registration was a member of that party, that Draeger and Vogel directed petitioners in registering under the Act to conceal and falsify their connection with the Nazi party, that petitioners followed such directions, that after their registration they continued from day to day to misrepresent to the government their connection with and activities in the Nazi party. The indictment alleges that as a means of accomplishing the conspiracy the petitioners appeared for registration and in registering falsely failed to disclose their connection with and activities in the Nazi party. The indictment sets forth forty overt acts. Many related to instructions given by Draeger and Vogel to various defendants from September to December 1940, in connection with their registration. Others related to the registering by petitioners in November and December, 1940. The last overt act alleged to have been committed by any of petitioners was the filing by Mayer of his registration statement on December 23, 1940.

Of the 31 indicted, only the three petitioners were convicted after a jury trial.[3] Fiswick and Rudolph were sentenced to imprisonment for eighteen months each. Mayer

[3] Six entered pleas of guilty. There was a dismissal as to one, a severance as to fourteen. Ten were tried. The jury acquitted three and disagreed as to the other four.

was sentenced to imprisonment for a year and a day. The judgments of conviction were affirmed by the Circuit Court of Appeals, one judge dissenting. 153 F. 2d 176. The case is here on a petition for a writ of certiorari which we granted because the rulings of the lower courts on the continuing nature of the conspiracy were apparently in conflict with decisions of this Court. See *United States* v. *Irvine*, 98 U. S. 450; *United States* v. *Kissel*, 218 U. S. 601.

First. The nature and duration of the conspiracy assumed great importance at the trial for the following reason. Each petitioner after he was apprehended made damaging statements to agents of the Federal Bureau of Investigation. Mayer, in November, 1943, stated that he had applied for membership in the Nazi party and had not disclosed the fact because Vogel told him not to. Fiswick's statement made in April, 1944, was to the same effect. Rudolph made substantially the same admissions in November, 1943, and then in September, 1944, retracted them insofar as he had said that in registering under the Act and in failing to disclose his Nazi party affiliation he had followed instructions. His later reason for non-disclosure was his asserted desire to protect his family. Each of these statements was admitted at the trial. At first, each was admitted only as against the maker. At the close of the government's case, however, the District Court ruled that each of these statements was admissible against each of the other co-conspirators. It so charged the jury. Later the jury returned to the courtroom for further instructions. One of the questions on which the foreman stated that they desired instruction related to that part of the charge "where you said something about all of the defendants were bound by the act of one or something, something as a group, and the other said the individuals." The judge then repeated that the admissions of each were admissible against all provided there was a conspiracy and they were all in it.

The Solicitor General now rightly concedes that that ruling was erroneous. Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. See *United States* v. *Irvine*, *supra*. Continuity of action to produce the unlawful result, or as stated in *United States* v. *Kissel*, *supra*, p. 607, "continuous cooperation of the conspirators to keep it up" is necessary. A conspiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253. Under § 37 of the Criminal Code, the basis of the present indictment, an overt act is necessary to complete the offense.[4] The statute of limitations, unless suspended,[5] runs from the last overt act during the existence of the conspiracy. *Brown* v. *Elliott*, 225 U. S. 392, 401. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.

In this case the last overt act, as we have noted, was the filing by Mayer of his registration statement on December 23, 1940. That act was adequate as an overt act in furtherance of a conspiracy to make a false return. But there is difficulty in also making it serve the function of an overt act in furtherance of a conspiracy to conceal from 1940 to 1944 the fact that false returns had been made. All continuity of action ended with the last overt act in December, 1940. There was no overt act of concealment which followed the act of making false statements. If the latter is permitted to do double duty, then

---

[4] At common law it was not necessary to aver or prove an overt act. See *Hyde* v. *United States*, 225 U. S. 347, 359. The same is true under the Sherman Act. *Nash* v. *United States*, 229 U. S. 373, 378; *United States* v. *Socony-Vacuum Oil Co.*, *supra*, p. 252. But § 37 of the Criminal Code requires not only an agreement to do the unlawful act but also the doing of "any act to effect the object of the conspiracy". See *Hyde* v. *United States*, *supra*, p. 359.

[5] See, for example, § 1 of the Act of August 24, 1942, 56 Stat. 747, 18 U. S. C. Supp. II, § 590*a*, as amended by § 19 (b) of the Act of July 1, 1944, 58 Stat. 649, 667, 18 U. S. C. Supp. IV, § 590*a*.

a continuing result becomes a continuing conspiracy. If, as we think, the conspiracy charged and proved did not extend beyond the date of the last overt act, the admissions of each petitioner were improperly employed against the others. While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, *Pinkerton* v. *United States*, 328 U. S. —, and cases cited, all such responsibility is at an end when the conspiracy ends. *Logan* v. *United States*, 144 U. S. 263, 309; *Brown* v. *United States*, 150 U. S. 93, 98. Moreover, confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. If, as the Circuit Court of Appeals thought, the maintenance of the plot to deceive the government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in the role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators. *Gambino* v. *United States*, 108 F. 2d 140, 142–143.

It is earnestly argued, however, that the error was harmless. The "harmless error" statute (Judicial Code § 269, 28 U. S. C. § 391) provides that "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." We have recently reviewed the history of this statute and the function it was designed to serve in criminal cases. *Kotteakos* v. *United States*, 328 U. S. —. The Court there stated, p. —:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but

very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

We cannot say with fair assurance in this case that the jury was not substantially swayed by the use of these admissions against all petitioners. It is not enough to say that there may be a strong case made out against each petitioner. The indictment charges a conspiracy, not the substantive crime of falsely registering. The evidence that petitioners conspired with each other and with Draeger, Vogel, and others, is not strong. Though we assume there was enough evidence to go to the jury on the existence of that conspiracy, the case was one which a prosecutor would be anxious to bolster.

The prosecutor's case, apart from the admissions, may be briefly summarized. Draeger and Vogel were active in the affairs of the Nazi party in this country. Their stenographer a government witness, testified that applications for membership in the party were received at their office. Dues were paid there. A card file of members of the party and of applicants for membership was kept there. The name of each petitioner was on the list. A letter was sent to all on the list in August or September, 1940, over Draeger's signature, requesting them to discuss a matter with Draeger. Those who appeared in response to the letter were told to conceal their Nazi party membership or affiliation when they registered under the Act. Another

witness for the government—a defendant in the case who was granted a severance—also testified that Vogel gave instructions to party members not to disclose their affiliation with the Nazi party. And a clerk in Draeger's office testified for the government that the party members who came to the consulate were told to say in their registration statement that they were members of an innocuous sounding association of German nationals. There was no evidence that petitioners came to the consulate seeking advice. There was no *direct* evidence that petitioners had received the instructions from the consulate to conceal their party membership. There was no *direct* evidence that petitioners came to the consulate in response to the letter which was sent. They were not identified as being with any group which called there. There was no evidence that they conferred with Draeger or Vogel or with each other.

The Solicitor General states with commendable candor that in this state of the proof it was manifestly important for the prosecutor "to bring into the case against petitioners evidence of a character that might better convince the jury that when each failed to reveal his Party connection in registering he had done so upon Party instructions, and, hence, that he was a member of the conspiracy." The admissions served that purpose. They supplied the first direct evidence that petitioners acted pursuant to the instructions of the consulate. It is true, as respondent emphasizes, that none of these admissions implicates any petitioner except the maker. But since, if there was a conspiracy, Draeger and Vogel were its hub, evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project. And when the jury was told that the admissions of one, though not implicating the others, might be used against all, the element of concert of action was strongly bolstered, if not added. Without the admis-

sions the jury might well have concluded that there were three separate conspiracies, not one. Cf. *Kotteakos* v. *United States, supra.* With the admissions the charge of conspiracy received powerful reinforcement. And the charge that each petitioner conspired with the others became appreciably stronger, not from what he said but from what the other two said. We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial. The admissions apparently became of considerable importance in the deliberations of the jury, for, as we have noted, they asked for clarification of the instructions on that point. And the admissions so strongly bolstered a weak case that it is impossible for us to conclude the error can be disregarded under the "harmless error" statute. The use made of the admissions at the trial constituted reversible error.

Second. A further question remains. As we have noted, Fiswick was sentenced to imprisonment for 18 months. No fine was imposed. It now appears that he has served his sentence. Accordingly, it is suggested that the cause is moot and that the writ of certiorari should be dismissed as to him. We followed that procedure in *St. Pierre* v. *United States*, 319 U. S. 41, 42, saying that since the sentence had been served, "there was no longer a subject matter on which the judgment of this Court could operate." We added, however, that the petitioner had not shown that "under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied." P. 43.

The situation here is different. Fiswick is an alien. An alien sentenced to imprisonment for one year or more "because of conviction in this country of a crime involving moral turpitude" is, unless pardoned, subject to deportation if the crime was committed within five years after

the alien's entry into the United States. 39 Stat. 874, 889, 8 U. S. C. § 155. The conspiracy with which Fiswick is charged was formed and executed within that five year period, as his last entry was in 1937. The conspiracy of which he was convicted was one to impede the government in one of its lawful functions, to prevent it from obtaining information which the Executive and Congress deemed vital to our internal security, to conceal by fraud, deceit, and perjury [6] the ramifications of an organization in our midst bent on our undoing. We need not determine in this collateral way whether conviction for such a crime would involve "moral turpitude" within the meaning of the deportation laws.[7] But the judgment, if undisturbed, stands as unimpeachable evidence that Fiswick committed the crime charged. The hazards of deportation because of that fact are real.[8] To leave him to defend a deportation order on the ground that the crime of which he was convicted did not involve "moral turpitude" is to add to his burdens by depriving him of his best defense—that he was not properly convicted.

---

[6] The registration statements required by the Act were sworn statements. Regulations, *supra* note 1, § 29.4 (g), (j).

[7] Convictions for perjury, *Kaneda* v. *United States*, 278 F. 694, for frauds on the revenues, *Guarneri* v. *Kessler*, 98 F. 2d 580, *United States* v. *Reimer*, 113 F. 2d 429, for frauds with respect to property, *United States* v. *Burmaster*, 24 F. 2d 57, have been held by the lower courts to meet that test. And counterfeiting was so classified by the Court in *United States* v. *Smith*, 289 U. S. 422. As to deportation for violations of the Alien Registration Act of 1940 see § 20 (b) (4) and (5). See also Alien Enemy Act of 1798, Rev. Stat. 4067–4070, as amended 40 Stat. 531, 50 U. S. C. §§ 21–24; Presidential Proclamation No. 2655, 10 Fed. Reg. 8947.

[8] Although deportation is not technically a criminal punishment, it may visit great hardship on the alien. *Bridges* v. *Wixon*, 326 U. S. 135, 147. As stated by the Court, speaking through Mr. Justice Brandeis, in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, deportation may result in the loss "of all that makes life worth living."

Moreover, other disabilities or burdens may flow from the judgment, improperly obtained, if we dismiss this case as moot and let the conviction stand. If Fiswick seeks naturalization, he must establish that during the five years immediately preceding the date of filing his petition for naturalization he "has been and still is a person of good moral character." 54 Stat. 1137, 1142, 8 U. S. C. § 707 (a) (3). An outstanding judgment of conviction for this crime stands as ominous proof that he did what was charged and puts beyond his reach any showing of ameliorating circumstances or explanatory matter that might remove part or all of the curse. And even though he succeeded in being naturalized, he would, unless pardoned, carry through life the disability of a felon;[9] and by reason of that fact he might lose certain civil rights.[10] Thus Fiswick has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. In no practical sense, therefore, can Fiswick's case be said to be moot.

It is said, however, that having served his sentence, Fiswick may not be resentenced on a new trial and that if his conviction is reversed, he thereby escapes deportation. The argument is that he thwarts the deportation policy by electing to serve his sentence. We cannot assume, however, that Fiswick is guilty of the conspiracy charged. He was not accorded the trial to which he is entitled under our system of government. The conviction which he suffered was not in accordance with law. The errors in the trial impeach the conviction; and he must stand in the position of any man who has been accused of a crime but

[9] "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies." Criminal Code § 335, 18 U. S. C. § 541.

[10] Thus Mo. Rev. Stats. Ann. § 4561 renders such person incompetent to serve on a jury and forever disqualifies him from voting or holding office, unless pardoned.

not yet shown to have committed it. To dismiss his case as moot would permit the government to compound its error at Fiswick's expense. That course does not comport with our standards of law enforcement.

Reversed.